

Scottish Legal Aid Board

Response to the Legal Aid
Reform in Scotland
Consultation

September 2019

Executive Summary

1. The Scottish Legal Aid Board (SLAB) welcomes the consultation and the opportunity it provides for reflection on what sort of legal aid system Scotland could have for the future.
2. Legally aided services perform a valued public function, at both individual case and collective levels. At an individual level, services paid for by legal aid enable people to enforce or protect their rights, resolve disputes, defend themselves when the state and others take action against them and use the remedies, processes and facilities the law provides to manage their personal affairs and relationships. At the collective level, the ability to use the law to challenge the wrongful use of power supports the rule of law and provides a firm foundation for a society based on civil, political, social and human rights.
3. This consultation is an opportunity to reflect on the current operation of the legal aid system and all its constituent parts, with a particular focus on the case by case funding of advice, assistance and representation (referred to in this response as *judicare*). The consultation is seeking views on the appetite for radical change and covers a lot of ground. There are some fundamental questions about how far Scotland could go in reshaping legal aid as a public service and a range of quite technical questions about the operation of *judicare*.
4. The consultation asks about the possibility of reshaping legal aid as a public service. It is the main organising idea in the consultation and in our response.
5. We have tried to identify what legal aid provision, organised more as a public service, could look like. We have identified five illustrative models that provide examples of the kinds of changes that could be explored if the Scottish Government wants to adopt a public service approach to the design and delivery of legal aid services. The models incorporate changes that move from minimal to radical and show the potential degrees of change that the government could contemplate. Core to each of the illustrative models is a simplified, more flexible and less bureaucratic *judicare* structure.
6. Whether to reform and how much to reform is a matter for Ministers. Any specific reforms will no doubt be subject to further detailed development, analysis of costs, benefits and impacts and, if they require legislative or regulatory change, parliamentary approval.
7. In presenting the models and in our responses on the technical questions in relation to *judicare*, SLAB is not advocating a particular policy objective or future position. Policy making is reserved to Ministers. We highlight the key policy issues for Scottish Government to consider throughout our response. At the same time, and for any given policy direction chosen by government,

we explore in more detail the kinds of tools government may choose to use, how these might be implemented and how effective these might be in delivering specific outcomes. We make no assumptions about whether Scottish Government will or should choose to go down any particular path. In setting out our response in this way, and in identifying what the future legal aid system could look like, we hope to contribute to the debate stimulated by the Legal Aid Review and the government's consultation on what sort of legal aid system Scotland could have for the future.

Contents

Introduction	6
How have we framed our answers to the consultation?.....	6
Part 1: Foundations for Change	8
Legal aid as a public service	8
Illustrative future models of delivery.....	11
Description of illustrative models	12
Partial benefits and risks analysis	21
Benefits	22
Risks	23
Voice and interest of the user at the centre.....	28
The Review recommends the voice and interest of the user be at the centre of the legal aid system. Do you agree?	28
Means of engaging the user voice	28
Direct engagement through enhanced approaches to quality assurance.....	29
Indirect engagement through consumer panels	30
Engage user voice through connectivity across PFLA	31
Duty on prescribed list of bodies to work with Community Planning Partnerships.....	31
Flexible Legal Aid system with ability to address and adapt to user need	32
Do you consider that there are ways in which the mixed model can be strengthened?	32
Areas of law, groups being less well served by judicare and targeted responses – grouped response.....	33
Support additional flexibility for legal aid.....	38
Part 2: The Change Agenda.....	41
Scope.....	41
People	41
Legal disputes.....	42
Activities.....	44
Who can provide services in judicare	44
Changes that would support and strengthen the work of SLAB.....	45
Oversight.....	47
Do you consider changes to the composition and structure of SLAB’s Board necessary to help support a more strategic role?	48
Standard range of interventions, grants and contracts.....	48
Solicitors providing PFLA located within 3rd sector orgs.....	49
SLAB to employ lay advisers	50

Benefits of telephone triage	50
Channel shift	51
Memoranda of Understanding	52
Reform of judicare schemes	54
Simplification of judicare	55
Financial eligibility.....	56
Contributions	58
Clawback	59
Do you hold any other views on how the current system of contributions and clawback could be improved?	60
Merits.....	60
General controls.....	61
Best value.....	62
Do you support that SLAB should register and quality assure all those providing services paid by the Legal Aid Fund?	62
Do you agree with the Review recommendation that all quality assurance reviews and reports on both lawyers and third sector advice services be published?	63
Outlays	64

Introduction

1. The Scottish Legal Aid Board (SLAB) welcomes the consultation and the opportunity it provides for reflection on what sort of legal aid system Scotland could have for the future.
2. SLAB was established in 1987 to manage the legal aid schemes as prescribed in the Act and regulations. We operate the scheme as devised by Government and legislated for by Parliament. We are not a policy making body and the role of setting legal aid policy sits with the Scottish Government. Our policy role extends only to the application of any discretion we are given by the act and regulations as to their implementation.
3. The schemes we manage were originally devised in the immediate post war years as a means to pay the legal professions for legal services provided to “those of slender means and resources”.¹ As such, the schemes did not require or seek to encourage any change in the fundamental organisation, delivery or billing model for legal services. While the system has evolved over the intervening years, its basic building blocks remain largely unchanged, with the great majority of legal aid support distributed on a ‘judicare’ basis: case by case funding for services provided by solicitors in private practice and others instructed by them, such as advocates and experts.
4. This consultation is an opportunity to reflect on the current operation of the legal aid system and all its constituent parts, with a particular focus on the case by case funding of advice, assistance and representation. In shaping our response, we have taken part in consultation events and discussions with other stakeholders. We have worked with others in understanding the strengths and shortcomings of judicare provision, as well as considering the experience of other jurisdictions through published strategies and research.

How have we framed our answers to the consultation?

5. The consultation covers a lot of ground. There are some fundamental questions about how far Scotland could go in reshaping legal aid as a public service and a range of quite technical questions about the operation of judicare. Where it makes sense, our answers are grouped, rather than set out as responses to individual but inter-related questions. We use the definitions of key terms as provided in the Scottish Government’s consultation.
6. In line with the Scottish Government’s approach to the scope of the consultation we have not covered payment structures or fee levels in detail, as they are the subject of consideration by the Legal Aid Payment Advisory Panel. This group is tasked with advising on an evidence-based process and

¹ British Legal Aid and Advice Bill, Legislation Notes, 1949
<https://heinonline.org/HOL/LandingPage?handle=hein.journals/temple23&div=13&id=&page=>

methodology for the structure and review of fee levels for legal services provided by solicitors and advocates. Advocates and the services they provide are part of the range of services which a solicitor can call on to assist in an individual client's case, but they are not currently a gateway to legal aid funding. In considering our response, we have not considered change to the current model for engaging and funding advocate services by legal aid.

7. The potential for reshaping legal aid as a public service is the key theme of the government's consultation, as it was in Rethinking Legal Aid, An Independent Strategic Review (the Review). We have therefore taken that idea as a starting point for our response.

Part 1: Foundations for Change

Legal aid as a public service

8. Legally aided services perform a valued public function, at both individual case and collective levels. At an individual level, services paid for by legal aid enable people to enforce or protect their rights, resolve disputes, defend themselves when the state and others take action against them and use the remedies, processes and facilities the law provides to manage their personal affairs and relationships. At the collective level, the ability to use the law to challenge the wrongful use of power supports the rule of law and provides a firm foundation for a society based on civil, political, social and human rights.
9. The need to enable access to rights and remedies for those without the financial means to engage legal services has been recognised for centuries, and found its formal expression in the creation of the statutory legal aid system in the late 1940s. For 70 years, the legal aid system has helped support countless individuals facing family crises, the loss of their homes, numerous other disputes and problems with some form of legal resolution and, since 1964, criminal charges. That it has continued to be able to do so despite far-reaching and continuous changes in the law and society is testament to the general soundness of the system and the commitment of the legal professionals delivering the service.
10. But as our public institutions, legal frameworks and social, political, economic and technological landscapes have transformed, so the problems faced by the public have multiplied and diversified. The legal aid system has continued to fund vital services, but its evolution has not been as rapid or extensive as that of the needs of people, or the range of services or the means by which it might be delivered, funded and held accountable.
11. A central idea - legal aid as a public service - is the focus of both the Review and the consultation. So what does this mean, does our legal aid system shape up as a public service and, if not, what would be needed to address its shortcomings?
12. The consultation set out a series of characteristics of public services:
 - a. A clear focus on the needs of all user groups in the design and delivery of services, including transparency of availability and eligibility;
 - b. 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;
 - c. Governance structures that are accountable, transparent, cost effective, streamlined and efficient;

d. A whole system approach, involving cooperation and collaboration where possible across boundaries to achieve stated outcomes; and,

e. Includes accessible digital services.

13. At a general level, legal aid (judicare) can be seen as a means of publicly funding services that assist around 2% of the Scottish population each year and in doing so contributes, directly or indirectly, to the delivery of the national outcomes and purpose, as set out in the National Performance Framework². What is less clear is whether it displays the characteristics of a public service as set out in the consultation, as opposed to being a funding stream for services delivered to the public.

14. This distinction is not simply semantic: it says something important about the extent to which legal aid is, can or ought to be aligned with the National Performance Framework and all of its component parts - purpose, values and outcomes.

15. We have put consideration of that question at the front of our response, as much of what we consider later on in respect of users' needs and flexibility will reference how particular detailed changes could fit within possible future models of legal aid and how far each corresponds to the features of a public service outlined in the consultation.

16. The three questions in the consultation on legal aid as a public service are considered together:

- a. As currently structured and delivered, do you consider legal aid a public service?
- b. Are there changes that you consider would make legal aid function more as a public service?
- c. Are there potential risks to looking at the delivery of legal aid as a public service?

17. Our administration of the legal aid system - the determination of applications and accounts, our direct services and the running of a grant funding programme - are the public service aspects of what we do and fund and are organised and delivered accordingly. The bulk of services we fund are not however public services. Judicare funding comprises 93% of the legal aid spend on services. The remainder funds direct services³ and grant funded advice and legal services.⁴ The nature of judicare funding is that it is unplanned and largely non targeted. It is distributed via payment schemes designed more as a subsidy system than a public service, and is not readily directed towards specific needs, whether of

² <https://nationalperformance.gov.scot/>

³ Direct services meaning SLAB's directly employed solicitor services, the Civil Legal Assistance Offices (CLAO), Public Defence Solicitors' Office (PDSO) and the Solicitor Contact Line (SCL)- <https://www.clao.org.uk/home>; <http://www.pdso.org.uk/>

⁴ <https://www.slab.org.uk/advice-agencies/grant-funding-programmes/>

individuals or communities, or aligned with other public services, or focused on preventative rather than reactive needs at crisis points. That is not in any way to diminish the important work that solicitors do (and instruct others to do) for each individual that they assist and the impact that has for clients, the wider justice system and achievement of outcomes.

18. In the Scottish Government's policy paper A Sustainable Future for Legal Aid (2011) the Government stated that the legal aid fund "allows people, who could not otherwise do so, to be able to pursue or defend their rights or pay for their defence." The policy objective to allow people to pursue or defend some rights is an enabling objective. It is not a commitment to provide access to services to enable people to exercise rights. The current system is built on eligibility not entitlement: currently, a person could be eligible for help, but no service may be forthcoming; in an entitlement-based system, there would be a clear minimum offer for those who are eligible for help. This limits the ability of the current system to develop the characteristic of a public service as identified in the Consultation. Some key characteristics of the current model which are challenging to a public service design for legal aid are:

- a. **User needs:** there is little scope at either local or national level to direct the design or delivery of services. The rules on scope, eligibility and fees determine who might access help in relation to which problems, and what forms of help a solicitor might be paid for providing, but not whether any given service will be delivered, or how.
- b. **Transparency:** The transparency of financial eligibility varies from being clear (such as the formulaic approach to Advice & Assistance eligibility) to very personalised and therefore opaque, such as in Solemn Criminal Legal Aid where the eligibility test is based on a detailed consideration of the applicant and their dependants' income and outgoings, compared to the likely cost of their specific case.
- c. **Consistency of service :** beyond duty arrangements and limited targeted interventions (via CLAO, PDSO, SCL and grant funded services), there is no way to be sure of what services - if any - will be available for any given client, type of case or part of the country.
- d. **Governance:** although there are well embedded and effective governance structures in the legal aid system as it currently operates, there are areas where the governance is not fully transparent and not of a nature one might expect in a public service. In terms of **accountability**, while the Accountable Officer of SLAB is responsible for ensuring that public funds are properly spent for the purposes intended, there is limited accountability for the ability of the system as a whole to meet needs and deliver outcomes. Scrutiny of SLAB performance does not (and cannot) encompass the extent to which the legal aid system is

successful in meeting needs, or delivering on policy objectives or the National Outcomes.

- e. **Whole system approach:** The controls currently available for judicare provision mean that this funding stream is not amenable to a whole system approach which involves cooperation and collaboration across policy and service boundaries.
- f. **Accessible digital services:** The current fees and application structure would not readily support innovative digital service delivery as it is designed around traditional delivery of solicitor services to a named client; changes to the model of delivery allied to some changes in judicare payment and application structures could better support some digital service delivery.

19. Notwithstanding that the current system only reflects the characteristics of a public service to a limited extent, the current legal aid arrangements have considerable strengths on which to build. There are degrees of change - some potentially considerable - which could move legal aid provision along a continuum towards more of a public service model.

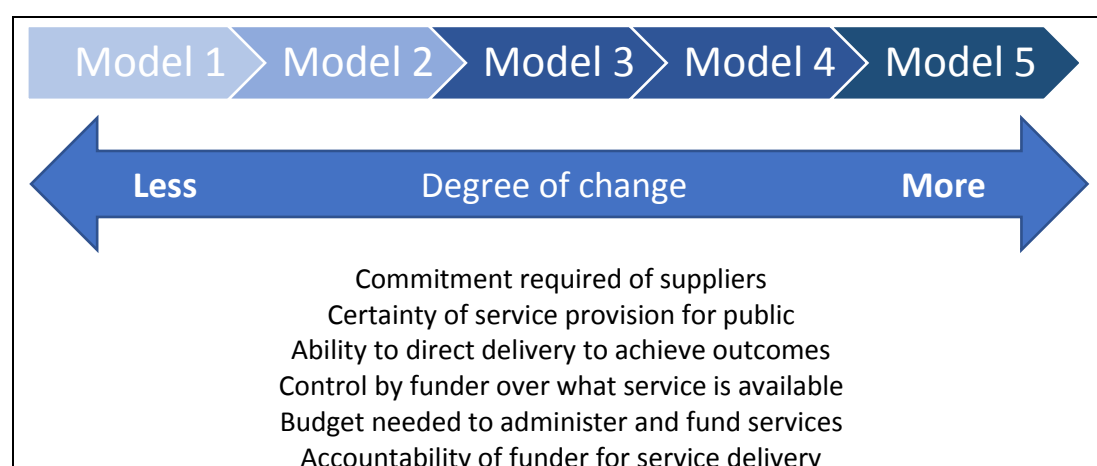
Illustrative future models of delivery

20. The Scottish Government sets out a possible long term aspiration to redesign legal aid to align more fully with a public service approach, with all that entails. To show the potential degrees of change that the Government could contemplate, we have identified five illustrative models from minimal to radical change. Models 1-5 progress through increasing levels of targeting and direction of funding, breadth of SLAB's role, commitment of the main delivery partners, certainty for the public, accountability and budgetary control. Core to each of the illustrative models is a simplified, more flexible and less bureaucratic judicare structure.
21. In presenting these models we have not contemplated a wholly public sector model. Private practice will maintain a crucial role in the delivery of legally aided services and any new model will need to take into account how to manage any degree of change without disrupting the continued supply of legally aided services which are part of any new model.
22. The models presented here range from a reformed and improved version of the current system, through to a radical redesign with a centrally and locally planned and managed legal aid service. See Figure 1 for an overview. They are offered not as a prescription, but in order to contribute to the constructive debate prompted by the consultation and to help decision making about what, if any, degree of change government wishes to pursue. As the models evolve through to Model 5, the degrees of commitment required by suppliers and the certainty for the public etc. increases, as does the need to transparently set

priorities. The balance between supply led provision of judicare which we refer to as non-targeted throughout and targeted funding shifts in each model. Targeted funding currently includes funding on our direct services (CLAO, SCL and PDSO) and grant funding and could also include contracted services in future. The actual balance that the Scottish Government might consider could be anywhere in the span presented here, or in any other formulation of models or combination of features. The numbers we have used to illustrate the models are not suggestions - they are for illustrative purposes only. The degree of disruption to current suppliers and current service models and the degree of change in the role and function of SLAB also shift as we move through to Model 5.

23. Each of the component parts of the various models can be seen as having its own continuum. Any number of further sub-models could be constructed by mixing and matching different points on each continuum for the various components.

Figure 1: Overview of illustrative models



Description of illustrative models

Model 1

Overview

24. Model 1 could improve alignment of legal aid with the public service approach by improving transparency of eligibility, improving some aspects of governance (including incorporating a consumer panel for technical change processes) and could make easier a fully digital application process.

25. Model 1 is therefore the current model, but with simplified judicare provisions. Some examples of the kind of changes that could be made to judicare are set out in the section on Reform of judicare schemes.

26. Subject to detailed development, testing and modelling, simpler judicare provisions could potentially encompass a single, simple financial eligibility test

undertaken by solicitors. So for example, a person would not need to apply separately and consecutively for Advice & Assistance and then Civil Legal Aid. One grant at the beginning of a solicitor's involvement could, subject to merits tests at various 'gates' along the way, provide access to legal aid funding throughout. Financial eligibility would need to be redrawn into a more straightforward and less detailed test which could be applied by solicitors. In any such system, some form of post-grant risk-based audit of those grants made by solicitors would be required to provide assurance on value for money.

General benefits

27. Applicants should have more clarity on their eligibility through the simple financial eligibility test and what they might pay, through simpler clawback and contribution provisions. Greater use of interim payments to solicitor firms should be possible, if supported by reframing the relationship between SLAB and the firm rather than, as at present, between SLAB and the individual solicitors and by giving SLAB a general audit and recovery power.
28. Simplified judicare provisions along these lines could produce the type of benefits outlined in *Figure 2* (at paragraph 62) for applicants, clients, solicitors and SLAB as the administrator of the system. Overall, solicitors should find the provision of legally aided services simpler and more attractive to administer, whilst this model could also allow people to more easily access legally aided judicare services and reduce any risk that people fall out of the process because of perceived or actual difficulties with satisfying the requirements of the current system.

Governance and administrative features

29. Governance could remain largely the same as the current model, except for those areas where changes to primary or secondary legislation are required to give effect to minor technical fixes arising from changes in the wider justice system. Under a new statutory framework, such fixes could potentially be amenable to management without the need for a statutory instrument or vehicle, such as through SLAB applying a test to ensure they are technical rather than policy changes, with a follow on consultation and approval process (as set out for the Codes of Practice). A consumer panel could enhance accountability of changes to the detail of how the legal aid schemes operate.
30. Enhanced information sharing powers, as identified in paragraph 165 could assist in the general operation of the system (for example, enabling SLAB to verify income digitally with HMRC or Revenue Scotland) and improve efficiency.

Model 2

Overview

31. Model 2 builds on the changes outlined in Model 1.

32. Increased alignment with a public service approach would be achieved by funding more targeted services, designed around user needs. Targeted services could be funded by either one or a combination of grant funded projects, contracts to deliver specific services, or direct services targeted at specific service provision. As an illustration around 20% of funding would be distributed on targeted services.
33. The accountability framework around judicare could change, with quality assurance (QA) arrangements being managed by SLAB expanded across the full range of aid types, and input to their design and delivery informed by the work of a consumer panel. More consistent QA could mean a code of practice for Civil, with registration for solicitors and firms, as well as compliance audit, across all aid types - as outlined in paragraphs 245 to 249. There could be scope to overhaul the QA schemes so that outputs or outcomes can be published and they can support the transparency objectives outlined in the Review (see “Do you agree with the Review recommendation that all quality assurance reviews and reports on both lawyers and third sector advice services be published?”).
34. This model has greater consistency in the powers available to SLAB, but does not fundamentally alter the funding mechanisms. In this version, the grant funding power could be available across any aid type and provisions to employ solicitors are simplified. A significant majority of legal aid fund expenditure could continue to be on non-targeted judicare services in this illustrative model, but with more targeted funding for specific Scottish Government priorities. This could be additional to judicare services.

General benefits

35. Greater transparency of access to targeted services should increase the transparency of availability of services. A consumer panel could have a role in the design of targeted services and in quality assurance of all services (non-targeted judicare and targeted). A whole system approach could have a greater reach in an expanded targeted service(s). Those expanded targeted services could include piloting and promoting digital solutions: for example, either for the remote delivery of advice or digital solutions for referral between providers to reduce barriers for people.
36. Other options could be opened up by simplified targeted provisions that account for more of fund expenditure: there may be additional grant-funding for more civil priorities (e.g. disability issues); pilot grants and/or employed solicitors to test new ideas about the delivery of criminal legal aid services (e.g. how to develop and implement an adversity and trauma informed approach in criminal defence, or how to introduce referrals to other forms of support as envisaged in the Review); employed solicitors delivering children’s, civil & criminal advice (operating under judicare means and merits tests) working with a grant funded organisation to target advice and support for care

experienced young people to further SLAB and Scottish Government's corporate parenting obligations.

Governance and administrative features

37. In addition to changes to the governance structure for technical fixes to the payment schemes in Model 1, this model could allow for fee changes for judicare to follow the model for dentists, GPs and ophthalmologists, where fees are set by Ministerial direction, following consultation. The judicare payment framework could include additional funding arrangements to complement other parts of the mixed model, with differential funding and financial incentives incorporated to serve particular needs and communities which have been prioritised by government, much in the same way as certain services are prioritised and separately funded for GPs.
38. If the higher levels of targeted funding were made available as standard (rather than for a specific period of time and purpose), then additional scrutiny and accountability for spend could be built in. This might involve SLAB identifying specific priorities under broad Ministerial direction through consultation and engagement with sectors beyond the legal profession; choosing between direct services, contracting, or grant funding routes to delivery; gaining approval from Ministers for these plans; being scrutinised on the achievement of outcomes and objectives by Ministers or by Parliamentary Committee. SLAB Board approval of decisions would be required at each stage.
39. There could be more scope for user input to the design and delivery of grant funded programmes and directly employed solicitors' services. This could provide an additional role for a consumer panel and making more use of collaborative engagement across the legal and advice sectors. The amount of information required to inform the panel's work and to inform the design of grant programmes would increase as compared to model 1. There would remain little impetus for SLAB to be subject to community planning duties.
40. The broad accountability framework and risk level could remain the same as with current arrangements and Model 1. SLAB's Board could encompass quality assurance expertise and those with experience of work in other public sector areas, to provide assurance of SLAB's exercise of broader QA powers and more use of grants.

Model 3

Overview

41. Model 3 moves more towards a centrally planned mixed model of provision. Judicare funding could be accessible only to those providers who sign up to a Memorandum of Understanding (MOU), which enhanced the current registration requirements by covering the provision of equalities data and requires providers

to make clear what services were on offer, in return for defined service standards from SLAB. Where services were commissioned or supported by way of grant, the availability of judicare funding and eligibility could be restricted or differentiated to complement targeted provision. The Memorandum of Understanding could be framed in such a way that it replaces the Codes as the foundation of registration and quality assurance. This could be underpinned by a consistent approach to audit and peer review to quality assure services and service delivery, and a more appropriate and nuanced range of sanctions where there is an adverse finding, as outlined in paragraph 241.

42. The third model adds more funding options - commissioned services for civil issues, for ancillary services and for the inclusion of infrastructure in the grant (e.g. case management systems, IT equipment for digital service delivery and judicare payments for lay advisers. Directly employed solicitors could operate outwith the judicare system, testing new models of service delivery that may subsequently be commissioned or rolled out as part of judicare, perhaps as reflected in the Memorandum of Understanding.
43. To achieve a more centrally planned model, a majority of legal aid fund expenditure might be through targeted methods of funding - around 60% targeted, but there could still be a large proportion of non-targeted funding for civil legal aid services via judicare funding.⁵ There could be commissioning of services prioritised by the Scottish Government - such as criminal and children's legal services. The contracts for commissioned services could either be contracts to deliver services funded on the judicare model or sit outside that model as in current grant funding arrangements.
44. In order to illustrate a move towards more of a public service model that can be directed towards outcomes, in this example most criminal and children's services, including duty, could be covered by exclusive contracts, with judicare funding remaining available for cases that are for new remedies or new users not anticipated in the contracts.⁶ The degree of exclusivity in any contract determines the amount of business which can be directed towards any supplier and the degree of choice in the market for any one user. As well as informing the MOU and testing new models of provision to inform further commissioning, directly employed solicitors could act as support should any contracted provider wish to withdraw.
45. Commissioning for ancillary services could include case management systems that automatically produce the management information required by SLAB in order to inform reporting on outcomes to Scottish Government. Data would become very important to understanding how forecast demand is being

⁵ Using the current spend profile from the legal aid fund, criminal and children's legal assistance account for around 60% of expenditure, hence their use as an example.

⁶ See discussion of this mechanism at section: *Risks to viability: reduced competition, capacity and on-demand supply*

expressed, as well as forming a basis for a payment regime under contract which could move away from case-by-case structure.

General benefits

46. There could be scope for extensive user input to the design and delivery of commissioned services, grant funded programmes and directly employed solicitors' services. Scottish Government policy priorities could be given effect through targeted services, the Memorandum of Understanding and quality assurance provisions- all informed by user input.

Governance and administrative features

47. Identifying the needs of specific groups and communities for contract provisions could become important. This could provide an enhanced role for a consumer panel and making more use of collaborative engagement across the legal and advice sectors. The amount of information required to inform the panel's work and to inform the design of grant programmes would increase as compared to model 2. SLAB may be conferred community planning duties, although collaboration could act as an alternative route to engagement with local authorities.

48. Where contracts were in place, these could include provisions which replace the need for any QA reports to be published, as the objectives set out in the Review may be achieved through procurement rounds and contract management.

49. For model 3, the level of scrutiny and risk could increase, as far more of the Legal Aid Fund would be directed and SLAB's registration requirements for judicare could be enhanced. The risk of services being promised but not delivered would sit between SLAB and central government. The possibility of Parliamentary scrutiny would increase, for Ministers, the Accountable Officer and SLAB's Board. SLAB's Board, in addition to the specialisms identified for model 2, may require procurement expertise to enhance its assurance function.

Model 4

Overview of governance and administrative features

50. Illustrative Model 4 replicates the provisions of model 3, but rather than a centrally planned service, legal aid delivery for targeted services could be agreed locally with councils. SLAB would be a community planning partner, making full use of PFLA connectivity and engaging with local authority staff on an ongoing basis. Legally aided provision may vary from locality to locality, subject to the identified needs of those communities and the policy objectives to be delivered.

51. SLAB's administrative budget could be higher than under Model 3 to accommodate the additional resource required to participate in community planning structures.
52. The level of scrutiny and risk faced by SLAB could be enhanced, as it would become accountable to both local and central government, which may have different expectations of legal aid as a public service. The risk of services being promised but not delivered would sit between SLAB, local government and central government. SLAB's Board would likely require a member with expertise in local government.

Model 5

Overview

53. The last indicative example moves the system further towards a centrally planned model, where the mix of service delivery is predominantly targeted- with non-targeted judicare expenditure accounting for around 20% of funding. The vast majority of legal aid fund expenditure could be targeted by way of contracts, grant funding or direct services. Some legal assistance could only be available digitally, via flat or interactive content, or webchat tools. Undirected judicare funding could still be available, operating as a safety valve to manage changes in volume and focus, subject to capacity and appetite of suppliers to engage with judicare.⁷
54. In addition to the developments outlined in models 1-3, the non-targeted judicare funding structure could be subject to enhanced levels of scrutiny, such as service standards being included in a MOU. Quality assurance could be able to support a panel solicitor system for specific case types, such as domestic abuse or for contact and residence work.
55. Cases for the panel could be referred from a telephone triage service, either delivered by SLAB in-house or by an externally funded organisation, including other specialist services such as the Scottish Domestic Abuse and Forced Marriage Helpline. Civil contracts could be let to deliver legal services which had been identified as services which contribute to the National Outcomes.

General benefits

56. There should be greater scope for user input to the design and delivery of contracts, grant funded programmes and directly employed solicitors' services. Scottish Government policy priorities could be given effect through targeted services, the Memorandum of Understanding and quality assurance provisions- all informed by user input.

Governance and administrative features

⁷ See discussion of this at section: *Risks to viability: reduced competition, capacity and on-demand supply*

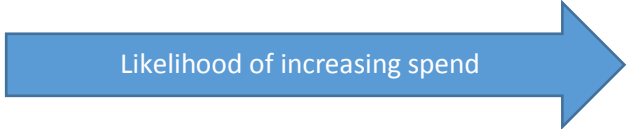
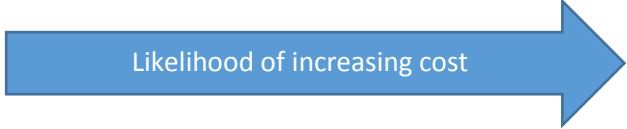
57. Under illustrative model 5, a budget for directed services could account for around 80% of the legal aid fund. A consumer panel with accompanying engagement strategy could proactively submit advice to SLAB for consideration, bringing accountability for choosing to address some areas of need rather than others, as well as in the development and design of contracts, QA, grant programmes and direct services. PFLA connectivity could have a role in this system. Publication of QA reports would be less useful in this more directed system, as quality is controlled via contracts.
58. Annual budget setting could be accompanied by Parliamentary scrutiny. Ministers could be responsible for setting SLAB's budget, but otherwise all other decisions and policy development could sit with SLAB's Board under a new legislative framework which defined in statute the outcomes for legal aid funding to achieve. The risk of policy conflict with Scottish Government could increase - for example where SLAB makes available representation in a forum where it was designed to operate without this input. The risk of services being promised but not delivered could sit with SLAB. SLAB's Board could additionally require expertise in research, public consultation and analytics, to help with the ongoing engagement role and data needed to manage the system.

Table 1: Summary of models' service delivery capabilities and controls

	Model 1	Model 2	Model 3	Model 4	Model 5
Simplified judicare provisions	✓	✓	✓	✓	✓
Strengthened judicare provisions	✗	✓	✓	✓	✓
Extended scope of judicare to lay advisers	✗	✗	✓	✓	✓
Extended scope of judicare to FAIs	✓	✓	✓	✓	✓
Grants for civil and children's	✓	✓	✓	✓	✓
Directly employed solicitors	✓	✓	✓	✓	✓
Directly employed solicitor services without means/merits tests	✗	✗	✓	✓	✓
Directly employed lay adviser services without means/merits tests	✗	✗	✓	✓	✓
Triage service (specific)	✗	✗	✗	✗	✓
Grants for all aid types	✗	✓	✓	✓	✓
Consistent quality assurance management for all aid types	✗	✓	✓	✓	✓
Contracted external legal services for all aid types	✗	✗	✓	✓	✓
Contracted ancillary services	✗	✗	✓	✓	✓
Enhanced judicare relationship (MOU)	✗	✗	✓	✓	✓
Enhanced code compliance sanctions	✗	✗	✓	✓	✓
Enhanced quality assurance for all aid types	✗	✗	✗	✗	✓
Published QA reports ⁸	N/A	More useful			Less useful, as contracts cover aim

⁸ to improve public scrutiny, build public trust in legal aid, provide a competitive advantage for high quality providers and drive improvement by poorer quality providers

Table 2: Summary of models' governance and administrative features

	Model 1	Model 2	Model 3	Model 4	Model 5
Enhanced approach to QA	x	✓	✓	✓	✓
Consumer panel	✓	✓	✓	✓	✓
Connectivity across PFLA	x	✓	✓	✓	✓
CPP duties for SLAB	x	x	x	✓	x
Parliamentary oversight of policy decisions and overall funding of the LAF	✓	✓	✓	✓	✓
Parliamentary oversight of funding priorities within the LAF	✓	x	x	x	x
Ministerial decisions on funding priorities and policy within the LAF	✓	✓	✓	✓	x
Ministerial decisions on affordability of the LAF	✓	✓	✓	✓	✓
Local government oversight of funding priorities within the LAF	x	x	x	✓	x
SLAB decisions on funding priorities and policy within the LAF	x	x	x	x	✓
Technical judicare fixes – revised framework	✓	✓	✓	✓	✓
Illustrative % judicare funding as proportion of all legal aid fund expenditure	over 90%	80%	40%	40%	20%
Overall legal aid fund expenditure					
Overall SLAB administration cost					
System administration involves TUPE, redundancy and pension considerations	Least		Most		
Likelihood of capped budget	Low		High		
Data requirements for system management	Low		High		
Change to SLAB's Board's composition	No change		Many new skills needed		

Partial benefits and risks analysis

59. Post consultation, in the event that government does wish to move towards a public service model, further development including a full cost benefit and risk

analysis of the Scottish Government’s preferred new model for legal aid services can be carried out. At this stage, we can offer preliminary views on the possible changes we have identified.

Benefits

High level benefits: freedom of choice and directing services to meet outcomes

60. A preponderance of targeted funding on a fixed budget basis has the benefit of directing service delivery towards the achievement of Scottish Government priorities and outcomes. This is not unusual in most public services, but it comes into conflict with a key benefit of non-targeted judicare, which is that it gives an ability to develop and use the law to challenge government and government bodies regardless of government’s stated priorities and sometimes in a direct challenge to the achievement of priorities. Non-directed judicare funding would remain available for case types not included in directed services in each model.

Detailed benefits

61. Alongside these high level principal benefits, a number of discrete improvements and enhancements can be envisaged for the applicant, provider, funder and policymaker. These detailed benefits would need to be explored, agreed and designed into any reformed legal aid system.

62. Additional detailed benefits and outcomes would be associated with different policy priorities. These would need to be carefully developed to ensure they do not cause a conflict between achieving the outcome and a solicitor or adviser’s duty to act in their client’s best interest.

Figure 2: Potential benefits sought from illustrative models

Benefits sought for applicants and clients

Models 1-2: ease of understanding the legal aid system; surety that they have legal aid funding in place; reduced interaction with legal aid system- rather than multiple legal aid applications; gaining faster access to legally aided services where eligible; resolve cases earlier – including keeping them out of court where appropriate

Additionally for Models 3-5: easier to find appropriate legal services funded by legal aid, which meet user focussed service and quality standards.

Benefits sought for solicitors

Models 1-2: remove any payment gaps; reduce legal aid admin-related operating costs per case; remove complexity and risk of errors arising from inconsistencies in eligibility and fee structures; reduce average number of interactions with SLAB per case; be simple to explain to clients; improved cash flow.

Additionally for Models 3-5: better ability to plan, build business and retain staff; increased infrastructure support to operate efficiently; clear quality and performance framework where governed by contracts.

Benefits sought for SLAB

Models 1-2: a reduction in the administration of the judicare legal aid system (such as double handling of information, number of decisions), a reduction in handling times and improved decision making. Judicare guidance would be simpler and it would be easier to train staff and explain things to customers. An improvement in relations with the profession may follow on from that.

Additionally for Models 3-5: Enhanced ability to fund outcome focussed rather than transactional services. Increased ability to respond to policy priorities.

Benefits for Scottish Government

Models 1-2: improved judicare system makes legal aid more attractive to the profession, making the legal aid system more viable and sustainable.

Models 3-5: an increased ability to direct core legally aided services to address policy priorities, giving a clearer line of sight to national outcomes.

Risks

63. The delivery of additional functions/roles would bring with them some challenges for Government, for us, our budget and general legal aid provision, together with challenges for providers and others in achieving the intended outcomes or implementing change.
64. Using the characteristics set out for a public service in the consultation, we consider that certain aspects of the redesign of the current legal aid system into a coherent service would not entail further strategic risks, but could bring benefits:
 - a. Increased means to focus on the needs of all user groups in the design and delivery of services, including transparency of availability and eligibility
 - b. Enhanced governance structures that are accountable, transparent, cost-effective, streamlined and efficient
 - c. More opportunities to take a whole system approach, involving cooperation and collaboration where possible across boundaries to achieve stated outcomes
 - d. Opportunities to fund and incentivise accessible digital services
65. The main risks we have identified are in relation to the shift from the current non-targeted system into a service which is able to offer and commit to consistency of service availability and quality across geography, subject only to

managed change. That risk can be managed. The scope of change, degree of change, and speed of change will be crucial to managing the risk.

66. For example, in order to manage the risk, Government could choose to limit the scope of change towards a consistent service provision for specific areas of law which are agreed as priorities. The degree of change is illustrated by the five models. Government, dependent on its appetite for change may wish to progress incrementally on aspects of these illustrative models. A new statutory framework could be framed to design in parliamentary oversight at key stages, but include all the levers and functions that might be required at the full extent of government's ambition.
67. Speed of change is self-explanatory; some aspects may require a long lead in time and joint working to support change, for example a move to commissioned services.

Feasibility – ease of implementation and time to implement

68. The ease of implementing a model and the time that may be needed to change to any new model are closely linked. The more change that is required to the statutory framework, the more that the overall governance framework would need to be reconfigured, with engagement and consultation at each stage. As will be explored in the specific feasibility risks, the ability of SLAB and the current provider base to effectively set up and operate a new system would require additional skills, data and resource.

Risks to feasibility: capacity of providers to participate in bid/ enhanced registration process, market disruption and capacity to deliver priorities

69. Moving to commissioned services could disrupt the market, as inexperience amongst some solicitor firms with the tendering process means they submit substandard or non-compliant bids and others deciding that the costs associated with procurement are disproportionate to the benefits to them. In England and Wales, some challenges to the Legal Services Commission's assessment of bids identified clear errors on the part of solicitors in submitting completed applications.⁹ Experience in operating the non-targeted judicare system does not easily transfer into procurement related skills.
70. Where capacity to engage in procurement is not well developed, there is a risk that gaps in required priority services emerge as the provider base does not have the skills and experience required to participate in a procurement. This should be mitigated by undertaking capacity building prior to commencing any procurement process.
71. Putting more quality assurance requirements in place and enhancing registration for judicare provision may also bring a risk of market disruption.

⁹ All About Rights Law Practice v LSC 2011 EWHC 964 (admin); R (Harrow Solicitors and Advocates) v LSC QB 2011 EWHC 1087; Hossacks v LSC Ct of A 2012 EWHC 1203

This may reduce delivery if - especially in civil - providers withdraw rather than meet the new requirements, even if once registered the judiciary system has been simplified. The civil market is made up of at least two distinct types of firms - those that focus on social welfare law which are funded by legal aid (we include Law Centres in this group) and firms who provide general civil law services -e.g. family, reparation, etc. -only some of which are funded by legal aid. There is a greater risk that those firms who deliver general civil services withdraw from legal aid rather than accept increased barriers to access to public funding.

Risk to feasibility: degree of change required in SLAB

72. To mitigate the feasibility risks associated with provider capacity, the funder's knowledge and understanding of the supplier base, as well as an ability to support the transition to a new system, become critical functions. Each additional targeted funding stream, especially contracts, would require detailed data and information to adequately specify the terms to achieve the outcomes intended. Procurement and contract management require a different set of skills as compared to those needed to administer a case-by-case payment structure.

Risks to viability: cost

73. Depending on the degree and scope of change, there may be risk around the costs of a changed system which promotes and targets services to meet user needs and the overheads required to inform a targeted and user centred approach.

74. In a targeted service costs may become subject to a capped budget rather than a demand led budget. If most or all service delivery is funded from a fixed budget, then budgeting decisions on competing priorities between and within criminal and civil problems will have an impact on the availability and accessibility of services. If Government budgets are reduced, then services funded under a capped budget must have the means to deliver efficiencies and prioritise services or risk closure and withdrawal of service. The current demand led budget is limited only by the means and merits controls and the profession's willingness to do legal aid work on a case by case basis.

75. The costs of administration would likely increase (or at least spike) as SLAB transformed from an organisation which is focussed on millions of micro decisions across thousands of funded cases, to an organisation which has a more strategic role and decision making function. This would require more strategic skills, contract management skills, stakeholder engagement and analytical skills than are currently available.

76. The cost of spending on legal aid services could increase depending on decisions on scope and extent of change. A fully integrated service with consistency of service across geographies on all issues in scope would increase costs which could be offset, to some extent, by the provision of some services online. A full

costing and cost/ benefits assessment would be required when the Scottish Government's intentions are known.

Risks to viability: over or under specification of contracts

77. Depending on the type of contract being let, demand on a service may outstrip the fixed capacity bought by the funder. This could lead to pressure on service providers, waiting lists and complaints, or using undirected judicare as a pressure valve to deal with fluctuations of demand. Alternatively, demand may be less than was anticipated, leading to idle resource. Both of these situations could exist at once across the system. The ability to forecast how potential need for a service translates into demand becomes key. This risk can be mitigated in part by maintaining undirected judicare funding. The degree of mitigation will be dependent on providers' capacity and appetite to engage judicare funding in addition to contracts.

Risks to viability: reduced competition, capacity and on-demand supply

78. If contracting on a fixed budget basis was to become the main funding route, the lack of remaining judicare business could make the on-demand system less viable for providers of legal services who have adapted their business models to meet the demands of a targeted funding model. Depending on how it is constructed, a mainly contracted system could create a barrier to participation by some small businesses.

79. If enhanced registration were to lead indirectly to a reduced number of firms in a market and/or compliance with quality assurance requirement has higher costs and leads to the exit of firms, this may lead to reduced market competition and coverage- leading to more oligopolies or monopolies. This could lead to increased fees and overall costs for some areas.




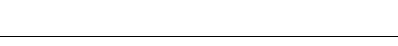


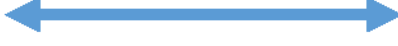
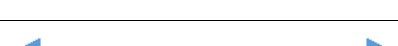





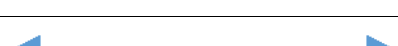
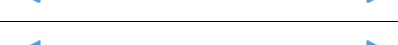
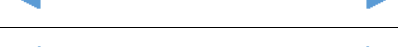

Risks to viability: mismatch in eligibility and impact on opponents

80. If contracts are let which remove means and merits tests for specific prioritised services (as the contract becomes the means of managing access and budget) there may be a greater risk of dissatisfaction with the service overall, as judicare would likely retain such tests and highlight mismatches in eligibility requirements. We have such a mismatch in some of our grant funding programmes in which we give effect to Government policy to prioritise housing debt and debt cases. Grant funded organisations have been able to deliver advice and representation without applying means or merits tests, except where the client seeks the protection of being an assisted person, as they are subject to other funding controls and monitoring.

81. The current controls (means and merits) help manage access and budget. Legal aid also has an impact on opponents whether private individuals or organisations. The controls have an important role in managing risk to others who may be involved in litigation and the wider justice system. Any reduction in that control will have to take account of the risk to opponents and provide

means to balance and manage that risk. These are risks to the perceived legitimacy or fairness of the system.

Table 3: How models compare on a high level appraisal of new benefits and additional risks to service delivery

	Model 1	Model 2	Model 3	Model 4	Model 5
Feasibility – ease of implementing this model	Easiest				Most difficult
Feasibility – time to implement this model	Shortest				Longest
Risk to feasibility: capacity of providers to participate in bid/ registration process	Lower				Higher
Risk to feasibility: market disruption reduces overall capacity to deliver legal services	Lower				Higher
Risk to feasibility: lack of capacity to deliver funder’s priority legal services	Lower				Higher
Risk to feasibility: degree of change in SLAB functions, staffing and skills needs	Lower				Higher
Viability – sustainability over the longer term	Few new risks				Most new risks
Risk to viability – over specification of contracts	Lower				Higher
Risk to viability – under specification of contracts	Lower				Higher
Risk to viability – mismatch in eligibility requirements	Lower				Higher
Risk to viability – impact on opponents	Lower				Higher
Risk to viability – shrinking of judicare	Lower				Higher
Risk to viability – reduced competition	Lower				Higher
Risk to viability - lack of capacity to deliver funder’s priority legal services	Lower				Higher
Benefits: freedom of choice	Higher				Lower
Benefits: Direct to achieve outcomes	Lower				Higher
Features: Has public service characteristics	Few				Most

Voice and interest of the user at the centre

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

82. As the consultation notes, currently solicitors and advocates are the primary users of the legal aid schemes and the 1986 Act reflects that. As well as those professional users of the current system, SLAB sees legal aid applicants and clients of our direct services as key user groups. We undertake research regularly with all these users to understand their needs, views and experience of the system as it currently runs. Where possible, we take these into account in how we plan and deliver our services.
83. More can be done to capture the user voice as it relates to legal aid applicants and clients of legally aided services- the direct users. Depending on the degree of change post consultation, user need and the needs of those who could be direct users can inform the operation and administration of the legal aid system by SLAB, the identification of priority services, and the design and delivery of legal services funded by legal aid.
84. Around 2% of the population use the judicare system each year. There are other people, organisations and services with an interest in how the legal aid system operates. Users of legally aided services will be involved in disputes and adversarial proceedings, meaning that opponents have a keen interest in the system, even if they are not users. More broadly, others impacted by the legal aid system include the Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service, Scottish Prison Service, Mental Welfare Commission for Scotland, Children's Hearings Scotland, Scottish Children's Reporter Administration, local authorities, the third sector and others.
85. The current model of delivery is not required to respond to all expressions of user need - the decision to provide services is made by solicitors on a case by case basis - and services need not be structured or delivered in ways that target particular types of problems or promote access for those with specific needs. The means for giving effect to funding decisions and service design informed by user need are limited in the current system: meaningful user engagement and user directed design is increased where there are more mechanisms to direct funding and service design. A range of different models could therefore offer more opportunities to integrate the user voice in the design of a system and individual services focused on user needs. Of the illustrative future models of delivery, model 5 offers government the most opportunities to design a system in this way.

Means of engaging the user voice

86. Each of the options presented in the consultation could, separately or in combination, enhance users' involvement in or influence over the

development, delivery and performance measurement of a legal aid service. The opportunities to embed the user voice increase as one moves through the indicative models. The relative utility of the individual elements of each option also changes as the model as a whole changes. For example, the quality assurance route is most valuable in a model which relies heavily on non-targeted judicare, but less so where quality controls are embedded in the commissioning of services. Conversely, the opportunities for consumer panel input expand as the service develops towards Model 5. Information on user needs and experience, however obtained, can inform policy and operational choices, but will not provide a prescription for what services should be delivered or how.

Direct engagement through enhanced approaches to quality assurance

87. Quality assurance offers some opportunity to embed the voice of legal aid applicants and clients. In a fully targeted and directed system the expectations and arrangements for assessing the quality of services could be incorporated into agreements between the service provider and the funder, or sit separately in Codes of Practice/Memoranda of Understanding and peer review criteria. A separate quality assurance regime would provide a common base for all services where there is a mix of funding mechanisms for legal aid.
88. Quality assurance can help steer services towards meeting the needs of direct users by reflecting those needs in both peer review criteria and the compliance audit function, which together form a major part of current quality assurance arrangements. Quality assurance can also reflect the wider user interest, for example by incorporating criteria focused on cooperation with other parts of the justice system, or early efforts to resolve cases. However, it is mostly concerned with the conduct of a case and individual acts of assistance and so is likely to be more reflective of the direct user experience.
89. The current quality assurance model could be improved by a consistent approach and set of powers across all aid types and provider types (solicitors, firms, advocates, advisers and advice organisations) for audit and peer review, which together would make up an overarching quality assurance scheme.
90. Such a unitary scheme could incorporate the user voice in the design and development of the scheme foundations, such as Codes of Practice/Memoranda of Understanding, expected individual adviser competences and/or organisational service standards. As currently, the fundamentals of the approach to defining and monitoring quality could remain subject to Ministerial approval post consultation - with that consultation expanded from its current statutory focus on the legal profession to include either a consumer panel, survey work with users or public consultation.
91. This would clearly link quality assurance to the needs of direct users, aligning development of service delivery with those expressed needs. User voice would

help to identify the risks that are important to the end-user and inform the design of quality systems to address these proportionately. As a foundation for the delivery of services in a legal aid service, we consider that such a unitary framework - linked as it is to publicly funded assistance - ought to be managed by SLAB.

Indirect engagement through consumer panels

92. A consumer panel could engage the wider user voice and experience, as well as those who are direct users. As the direct users are a relatively small group of the population who are unlikely to have an ongoing involvement with a legal aid service (in contrast to health and education for example), a consumer panel may be more useful in engaging the wider user interest. A consumer panel could supplement its members' own knowledge and experience by commissioning legal needs research, independently or jointly with SLAB. We regularly undertake research with applicants involved in legally aided services, studies where participants are members of the general public, as well as targeted stakeholder engagement to inform specific change proposals. Such work could be done in conjunction with or in response to requests from a consumer panel.
93. Currently, SLAB has no standing external advisory panel with an input to legal aid governance or design. Consumer panels are a feature of the regulatory landscape in Scotland and England & Wales. The Scottish Legal Complaints Commission has a consumer panel¹⁰ as does the Legal Services Board, in the form of the Legal Services Consumer Panel,¹¹ and the Financial Conduct Authority.¹² These draw mainly on regulatory experts, consumer advice organisations, or consumer experts, professionals and academics. A feature of these consumer panels is that they provide independent advice which the main body has a duty to consider and respond to.
94. The ongoing cost associated with maintaining the panel and responding to its work would depend on the panel's scope: for example, a focus on consumer input to quality assurance as opposed to consideration of targeted delivery such as grant funding or direct employment of solicitors. A consumer panel could have a broad proactive scope: provide input into the design of quality assurance schemes, targeting and design of legally aided services and legal needs surveys and legal aid systems and processes. The cost of supporting a panel and associated research would need to be appropriate to the scale of the overall legal aid budget and the scope for any recommendations to be implemented. The latter would increase alongside the scale of targeted expenditure, whereas

¹⁰ <https://www.scottishlegalcomplaints.org.uk/about-us/consumer-panel/>

¹¹ <https://www.legalservicesconsumerpanel.org.uk/>

¹² <https://www.fs-cp.org.uk/>

in the current system there is considerably less scope for a consumer panel to have a significant impact on the prioritisation, design or delivery of services.

Engage user voice through connectivity across PFLA

95. Collaborative engagement is a positive move towards identifying community or group needs for legal and geographical areas, taking into account local provision. It would be of particular use in helping guide funding decisions for targeted assistance. It is most useful in Models 4 and 5, but does have a role to play at present in cyclical funding decisions such as in grant funding. We do not consider that this is an alternative to either a consumer panel or enhanced quality assurance.
96. SLAB, along with the Improvement Service, co-produced the Framework for Public Funding of Advice in Scotland (the Funders Framework), which sets principles for funding advice services that emphasise the need to engage with strategic partners at an early stage to help the totality of funding achieve greatest benefit. It is designed to be used when planning the launch of a new funding round so that funding can take account of other funders' priorities, identify advice needs of communities and take into account already existing provision.
97. Similar mechanisms to inform design and delivery of a legal aid service are feasible but, as with a consumer panel, their usefulness depends on the degree to which reform moves towards Model 5 and a proactive, planned and prioritised service.

Duty on prescribed list of bodies to work with Community Planning Partnerships

98. SLAB is not currently part of community planning arrangements. Whilst targeted interventions (such as grant funding or direct employment of solicitors) are amenable to the kinds of planning envisaged by the Review and can be given effect by the Funders Framework, judicare services are not subject to the kinds of controls that might align services with the goals of Community Planning Partnerships (CPPs). As was recognised by the Review, engagement in local planning would require a different set of arrangements for legally aided services, such as a Memorandum of Understanding, contracts/commissioning and referral agreements.
99. Legal services can be a valuable means of supporting the achievement of CPPs' goals, although the focus of community planning¹³ on prevention, early intervention and tackling inequalities may not sit easily with much legally aided solicitor advice and representation, which is engaged at moments of crisis and

¹³ <https://www.gov.scot/publications/community-empowerment-scotland-act-2015-part-2-community-planning-guidance/>

with a core expertise in criminal and family law. The types of outcomes supported will vary by the area of law and group of users served.

100. Aligning the legal aid fund to an outcomes focussed approach would require a major change in powers, functions and duties for SLAB which would be difficult to discharge if services were mainly provided via judicare on the current basis.
101. The ability of SLAB to contribute effectively to partnerships may also be constrained by the scale of SLAB's spending power. SLAB's total budget provision for 2019/20 is £137m (including both administration and legal aid fund expenditure), whereas the local authority grant from central government is £10bn and territorial health boards also share £10bn.¹⁴
102. Placing duties on SLAB and other justice bodies not already engaged in the CPPs would not be an effective use of resources unless Government envisaged moving to local delivery plans for the delivery of all legal aid services as per Model 4.

Flexible Legal Aid system with ability to address and adapt to user need

Do you consider that there are ways in which the mixed model can be strengthened?

103. The mixed model consists of unplanned, privately provided services alongside targeted provision which can be directed at activities which the market does not fully meet or which funders want to prioritise. This model could be strengthened so that each part of the model works together in a complementary way, so that the public are able to draw on the most appropriate help and be referred, signposted or move between different types of providers and services as suits their needs. As noted in the consultation, services to be delivered would be clearly defined on the basis of an understanding of which kinds of services ought to be supported by the legal aid fund.
104. Complementarity could be achieved in different ways. In Models 3-5 there are more opportunities to target services by way of grant or contract. Grant and contracts would complement existing funded services where service provision is settled. As a further support, undirected judicare rules could be adjusted to ensure that the contracts operate at their most effective. For example, if there are contracts in place to provide homelessness services in a named local authority areas, then judicare rules could be adjusted in those areas to ensure that all cases are dealt with by the contract holders or other targeted services. Arrangements could be made for onward referral to judicare providers in the event of excess demand for services, or to facilitate access to

¹⁴ <https://www.gov.scot/publications/scottish-budget-2019-20/pages/0/>

advice on related aspects of a problem where these cannot be addressed by the contract holder.

105. Depending on the degree to which the Scottish Government seeks to develop legal aid provision into one coherent service, the design of a strengthened mixed model could include alignment of funding controls, monitoring, and QA to provide appropriate and consistent levels of oversight regardless of service provider or funding mechanism.
106. A flexible legal aid system will be key to delivering services designed around user need. The following section considers how a flexible legal aid system could respond to problems for particular groups of people, problems or in particular places.

Areas of law, groups being less well served by judicare and targeted responses – grouped response¹⁵

107. An undirected judicare model in which the market decides which services to deliver, is highly unlikely to produce a pattern of service provision which is consistent over time and geography or which responds to all user need. It is not ‘designed’ to do so, in any practical sense. In the absence of detailed user needs identification, a clear understanding of which kinds of services would be best placed to meet such needs or a clear articulation of which needs ought to be supported by the legal aid fund, the difficulty, of course, is in identifying any gap between those needs the existing broad scope and eligibility criteria *can* meet, *should* meet and those it *does* meet.
108. Accordingly, we have answered these questions as a group. They suggest to us a similar need to understand user need and to identify and put in place responses which take account of that. We have structured this by focussing separately on groups of people, problems and places which may not be as well served by the current judicare structures as others. These areas of law, geographies and/or people may benefit from increased targeting of services as envisaged in the different models for change.
109. Decision making about which people, places or problems do require a targeted service or targeted approach to judicare should be supported by a transparent assessment of need and setting of priorities. Our periodic monitoring reviews are a mechanism for identifying possible problems in access to services. These reports are based on the best evidence available, including bespoke primary research conducted to explore issues of accessibility and availability. Where concerns have been raised with us as part of our monitoring

¹⁵ This covers SLAB’s response to: Are there specific areas of law, e.g. domestic violence or disability issues that the current judicare funding arrangements are serving less well? Are there specific areas of law that might benefit from a more targeted approach to funding solicitor services? Are there certain groups that when accessing legal aid might benefit from a more targeted approach to funding solicitor services?

function or more generally (under our duty to secure Best Value) we have explored these in more depth to seek a solid evidence base.

110. In conducting this monitoring work we have tended to confine our research to comparisons between places and/or over time. We have recently refocussed how we carry out our monitoring function, in part because of the absence of a stated policy or expectation about the extent of availability or accessibility of legal services (not confined to legal aid funded services).

People – deaf and hard of hearing

111. Under our monitoring function, we undertook some small scale research to improve our understanding of the scale and nature of problems faced by people who are deaf, deafened, deafblind or hard of hearing in accessing legal services for civil problems, whether publicly or privately funded. We did this by gaining feedback directly from people who may have had experience in accessing or attempting to access legal services.

112. Overall, the research suggested that deaf and hard of hearing people do face barriers to accessing legal services, particularly in terms of access to suitable communication supports and the arrangements for paying for these.

113. The themes highlighted in the research could potentially be dealt with by targeted interventions (such as commissioning training) but others may be addressed by changes to the framework covering case-by-case payments (such as covering the cost of communication support at the first meeting, pre-grant of any legal assistance). The report is available on our website.¹⁶

114. The Scottish Government's Fairer Scotland for Disabled People report¹⁷ identified an issue with how the current legal aid framework might negatively impact people with some types of disability. We agree that the current legislative framework can mean that people with disabilities who need additional communication aids to engage with their solicitor may find that they pay an increased cost in either contributions or clawback. This runs counter to the principle that a disabled person ought not to pay for their own adjustments.

115. One solution may be for SLAB to administer a fund that is specifically for adjustments, so that these are not added to the cost of the case and chargeable to the client via contributions or clawback. Charges for adjustments may become less common in future as technology is funded by other parts of the public sector (for example, the extension of ContactScotland availability¹⁸

¹⁶ <https://www.slab.org.uk/corporate-information/what-we-do/monitoring-legal-services/>

¹⁷ <http://www.gov.scot/Publications/2016/12/3049/0>

¹⁸ <https://www.slab.org.uk/news/contactscotland-bsl-service-extended/>

and the funding of augmentative or alternative communication aids¹⁹ for anyone who has lost their voice or has difficulty speaking).

People – eligibility

116. The financial eligibility tests are currently designed to assess eligibility over a period of time. In Advice & Assistance - the period has remained unchanged since its introduction in 1973. It is based on the preceding week's income and capital- clearly referencing a time when the majority of workers within the ambit of the scheme were paid weekly.
117. In civil legal aid, eligibility is forward looking (a year) which allows for eligibility based on the circumstances during the time they might be expected to have assistance. The computation time and basic structure of the financial eligibility tests have remained unchanged since the 1950s. It was designed for an era of near full and steady employment and a differently configured benefit system to that in place now. Although the essential rationale for a forward looking computation period remains sound, the financial eligibility tests can be difficult for people who come on and off passported benefits or tax credits and into part-time low paid work, with or without top-up benefits or credits. This can make evidencing civil legal aid eligibility very difficult, even for the most organised. The shifting nature of their circumstances makes it difficult, because by the time one piece of information is collected, something might have changed again.
118. The civil legal aid eligibility test assumes that a person has a basic disposable income of any income over £3,521 per annum. That disposable income can be reduced by further deductions for outgoings which the person is committed to making, housing costs, debt, and childcare etc. This flexibility coupled with contributions allows for broad eligibility for those able to vouch for outgoings.

Problems

119. The areas of law where we have most recently identified a risk of access to judicare are in housing law: homelessness, repossession of rented property and owned property. Services that meet some of the advice needs of this group may be provided locally by other forms of publicly funded legal assistance. Advice agencies or local authorities provide advice on some types of issues more often than solicitors or advocates. So although judicare has wide scope, it is not a well-used source of help in some legal problem types, with people either preferring, only identifying or only able to access other sources of funded assistance.
120. Housing advice is one area where local authorities are particularly active either in the provision of in-house or locally funded services. However, for

¹⁹ <https://www.gov.scot/publications/guidance-provision-communication-equipment-support-using-equipment/>

those cases where representation is required at a level which cannot be provided by a lay advisor, judicare or funded solicitor services will be required to augment the work of the advice sector.

121. In homelessness cases, we observed that there are geographical variations and distinctions by type of firm acting, but we were not able to conclude that there are systemic availability issues with people actively seeking legal services but being unable to access them. That said, services are clustered geographically around law centres and CLAO and that itself may pose a risk that systemic issues could arise in local areas that do not have those services. However as homelessness legal responses are heavily influenced by local authority practice, we do not know if legal issues arise with the same frequency outwith the areas with active services.
122. The monitoring report showed that solicitor providers of legal advice for homelessness are primarily law centres based in Dundee and Glasgow, with few lawyers in private practice making use of the legal aid schemes. Potential options for targeting funding at specified legal services include those listed, if SLAB had new powers in place. These options would be available within Models 3-5 of our illustrative models:
- a. Seeking to let local contracts for the provision of such advice where no local provider is active, payment by judicare or other mechanism
 - b. Funding a national second tier advice service to connect local advice providers, or other specialist homelessness services to legal advice
 - c. Grant fund innovative services to test the level of demand and refer cases to CLAO or law centres where solicitor intervention required
 - d. Targeting advice at homelessness via grant funding of lay advisers in projects around Scotland could complement any of these options.
123. For both repossession of mortgaged and rented property, the evidence was that across all courts a minority of defenders have solicitor representation. It is more straightforward to make an assessment of a legal need for those who are defenders in civil court actions (as opposed to possible pursuers as in homelessness cases), as in comparison to overall volumes, there were few defenders represented from either grant funded projects or solicitors funded on a case-by-case basis, with very few solicitors in private practice. As services are clustered in the central belt, there may be rural access issues.
124. A similar suite of possible responses as for homelessness law may be possible, with the additional option of duty arrangements at courts. The data available for the monitoring report highlighted that targeting of repossession actions through grant funding had resulted in a closing of the gap between volumes and representation for defenders. This was part of a Scottish Government policy initiative that included legislative change to address the prospect of increased numbers of people losing their homes as a result of the economic downturn. Future change to the mixed model to align and make

judicare rules consistent with such policy initiatives, subject to controls to avoid over supply, could be considered as part of the mix of possible policy responses.

125. Stakeholders have also alerted us to concerns with access to services for pursuers in cases seeking civil remedies targeted at domestic abuse and people seeking access to judicial review. We explored these areas in more depth and did not find evidence of a possible systemic issue with representation, as had been the case with the three housing areas of law.

126. There have been frequent calls for judicare to be amended to lift the means test for pursuers in cases seeking civil remedies against domestic abuse (e.g. interdicts and exclusion orders). This is grounded in part by a concern that as matter of principle those seeking protection from harm ought not to be means tested, and in addition, that women dealing with domestic abuse are unlikely to be in a position to supply sufficient financial information. On the latter point we know that, in common with others who seek legal advice at points of crisis in their lives, full access to financial information can be challenging. The current financial assessment processes and tests are sufficiently personalised to accommodate different approaches to verification at times of crisis, although as noted previously it can remain difficult for those dealing with constantly changing financial circumstances.

127. The means test applies across the full range of civil legal aid case types, other than in Adults with Incapacity cases. Scottish Government has recently considered whether the means test ought to apply in the context of exclusion orders (one of the types of protective orders that can be sought) and announced in December 2018 that they were against making legal aid available without a contribution to all those seeking exclusion orders regardless of income.²⁰ The rationale at that stage was:

- a. "There would be increased expenditure for the hard-pressed legal aid budget
- b. Exclusion orders could be an ancillary crave to a wider family action. Free legal aid in relation to exclusion orders could lead to free legal aid for the wider family action too. This would be a major expense to the legal aid budget, given the number of family actions in court.
- c. If free legal aid should be given to those seeking exclusion orders, it is likely that, to ensure equality of arms, free legal aid would have to be given to those seeking to oppose the granting of an exclusion order."

²⁰ <https://www.gov.scot/publications/consultation-protective-orders-people-risk-domestic-abuse/pages/3/>

128. It is a matter for Government to decide whether it now seeks to depart from this recent statement. We consider that the technical concerns expressed at points b and c remain valid.

Places

129. If the legal aid system is to change into an entitlement based system in the shift to more of a public service, then we might expect that there would be more pressure on Ministers and the legal aid system to ensure that a range of assistance is available for every area.

130. That need not mean that a full range of local provision is in place across Scotland. In sparsely populated areas there are unlikely to be sufficient cases in some specialised subject topics to support a practitioner or firm, but the legal aid system can make out-of-area specialists available. That is available now, but it is not a guaranteed supply of services to areas with fewer generalist or specialist legal aid lawyers.

131. Our CLAO offices refer cases they cannot or do not deal with to other solicitors. That referral system relies heavily on solicitors travelling from other areas. In the past year, 45% of all referrals have been to out of area solicitors; the highest is referral of Children's Hearings at 62%, followed by Other (58%) and Death related matters (57%). There is particular issue around Children's Hearings as a number of people may require representation at the same hearing - thus requiring additional support.

132. The Highland & Islands CLAO service has the highest out of area referral at 60% of all referrals, followed by Argyll & Bute at 59%, Aberdeen and Aberdeenshire at 32% and Edinburgh and Lothians at 12%.

133. As with the possible policy responses for issues connected to particular problem types, the response could include:

- a. Seeking to let local contracts for the provision of such advice where no local providers exist, payment by judicare or other mechanism
- b. Funding a range of national second tier advice services to connect local providers to specialist support together with adjustment of the judicare payment to encourage uptake of specialist support.

Support additional flexibility for legal aid

134. SLAB supports the development of a refreshed statutory framework which would allow for additional flexibility and levers to encourage delivery of legal aid.

135. The current main funding mechanisms are judicare resulting in case by case payments to firms, funded direct services which provide judicare services to the public and grant funding services which can be accessed by the public without meeting the judicare eligibility rules.

136. Judicare access (regardless of whether it is in the private sector or in our direct services) is controlled by financial eligibility and problem type eligibility (scope). Once in receipt of advice/representation funded through the main legal aid schemes, there are some gates for the pre-approval of some kinds of expenditure. Other controls are the Quality Assurance schemes that are in place and, as judicare is restricted at the moment to solicitors, the pre-existing regulation of solicitors by the Law Society of Scotland.
137. The targeted or planned parts of the mixed model are grant funding and direct services. These are subject to fixed costs. Casework funded in this way does not need to be subject to the judicare eligibility tests. Although grant funding has tended to be used to fund services in the not for profit and public sector, the same model of funding could apply for private sector firms.
138. Each part of the mixed model brings different strengths to the overall provision of services to the public:
- a. Directly employed solicitors can provide resilience where private sector providers withdraw from a particular area covered by the legal aid scheme and provide insight into the operation of the justice system. They can also usefully test other service delivery models which, with a different range of levers, could then inform service delivery across judicare.
 - b. The judicare model in the private and third sector has the ability to react in an unplanned way if solicitors decide to focus on a particular issue, geography or population group - without a need to obtain agreement from the funder. This source of strength is also a weakness as firms can withdraw from a market just as quickly.
 - c. Grant funding needs to go through approved governance processes to increase budgets to meet new demand, or to transfer budget from existing commitments to accommodate new ones. Once commitment has been made there is clarity about the service which can be delivered and relied upon, subject to capacity. Grant funding has tended to focus on problem types - such as advice for those facing repossession because of debt - which the Scottish Government has wanted to prioritise, regardless of individual financial circumstances.
139. Options which would retain the agility of judicare funding to respond to new and developing areas of law, but provide flexibility to support targeted and planned intervention when required, and improve the connectivity across provision include the following elements, all of which are within our illustrative Models 3-5.:
- a. Memoranda of Understanding which include a specification of which particular judicare services are available from the firm and commitments to refer to additional services where appropriate
 - b. Differential funding and financial incentives within judicare to serve particular needs and communities which have been prioritised by Scottish Government.

- c. Differential service and technical quality requirements for judicare provision for particular needs and communities
- d. Commissioning of services where dependability of supply is important. This could sit outwith judicare as in current grant funding arrangements
- e. The ability to make changes to judicare rules in order to direct funding to commissioned services
- f. Direct services that can act outwith judicare, testing new models of service delivery that may subsequently be commissioned or added to any Memorandum of Understanding.

140. Each option would require robust governance arrangements, clarity of decision making roles as between Government and SLAB and clarity about the policy objectives and priorities for legal aid funding generally and any specific interventions. Controls would be required around budget setting for interventions especially where they coexist with a demand led judicare budget provision. We cover these issues in the oversight section.

141. There are also some technical fixes to the current legislation which would improve flexibility and introduce some consistency across all aid types about the powers we have to target funding. Similar powers across all aid types would allow for more flexible interventions, such as combined civil and criminal advice projects, or combinations of directly employed solicitors and lay advisers.

Part 2: The Change Agenda

142. We have grouped four linked questions together.²¹ They cover scope of legal aid and oversight of SLAB. The consultation suggests that discussion on scope is centred on justiciable issues not financial eligibility. However a later question raises the issue of lay advisors' access to legal aid funding and we consider that this introduces a wider treatment of scope than solely justiciable issues. As requested in the consultation we have not considered issues of financial eligibility in this part of our response.

Scope

143. The Scottish Government's aspiration to introduce ambitious positive change and maintain scope may need to be underpinned by a radical rethinking on how best to support wide scope within a legal aid service.

144. The scope of judicare (as it refers to the types of legal disputes which can be supported) is broader than a European Convention on Human Rights (ECHR) based approach would require. Any matter of Scots law is in scope for advice under the legal aid schemes. Compliance with ECHR is a floor for scope and the Scottish schemes go above that floor.

145. We assume from the consultation that future actions to maintain or strengthen scope ought to seek ways to maintain or extend scope whilst taking into account general public spending pressures.

146. We understand "other aspects of scope of legal aid" to be shorthand for referring to boundaries around:

- a. Which people are eligible
- b. Which legal disputes are eligible (normally defined by reference to the forum for resolution) - justiciable issues
- c. Which activities are in scope, and
- d. Which organisations, groups of people can provide funded activities

People

147. The various schemes only apply to natural persons. In recent years some recognition has been given to the difficulties that are faced by legal persons unable through limited resources to participate in legal processes.

148. Eligibility can be restricted when other people have an interest in common. This has an impact on certain types of litigation - most notably litigation where

²¹ This covers SLAB's response to: Are there actions that could be taken by the Scottish Government to help maintain or strengthen the current scope of legal aid? Are there any other aspects of the current scope of legal aid that you think should be reformed? Should lay advisers be able to access funding through legal aid to provide advice? Are there actions that should be taken by the Scottish Government to help support and strengthen the work of SLAB?

there is a wider public interest. Judicial review of the decisions of public authorities where there is a wider public interest is becoming more common.

149. In Fatal Accident Inquiries with a number of families, they may have a similar interest in presenting and testing the Crown's exploration of the issues but we are unable to treat them as a group. This may mean SLAB funding and individuals contributing to the costs of multiple legal teams, when any need for representation could be met by one funded legal team acting for all, in the absence of a clear conflict of interest, if the procedure allowed for group representation.²²

150. SLAB considers that a fresh consideration should be given to common or joint interest as it applies to legal aid funding, with a view to establishing a clearer framework for addressing this policy issue, including consideration of multi-party funding.

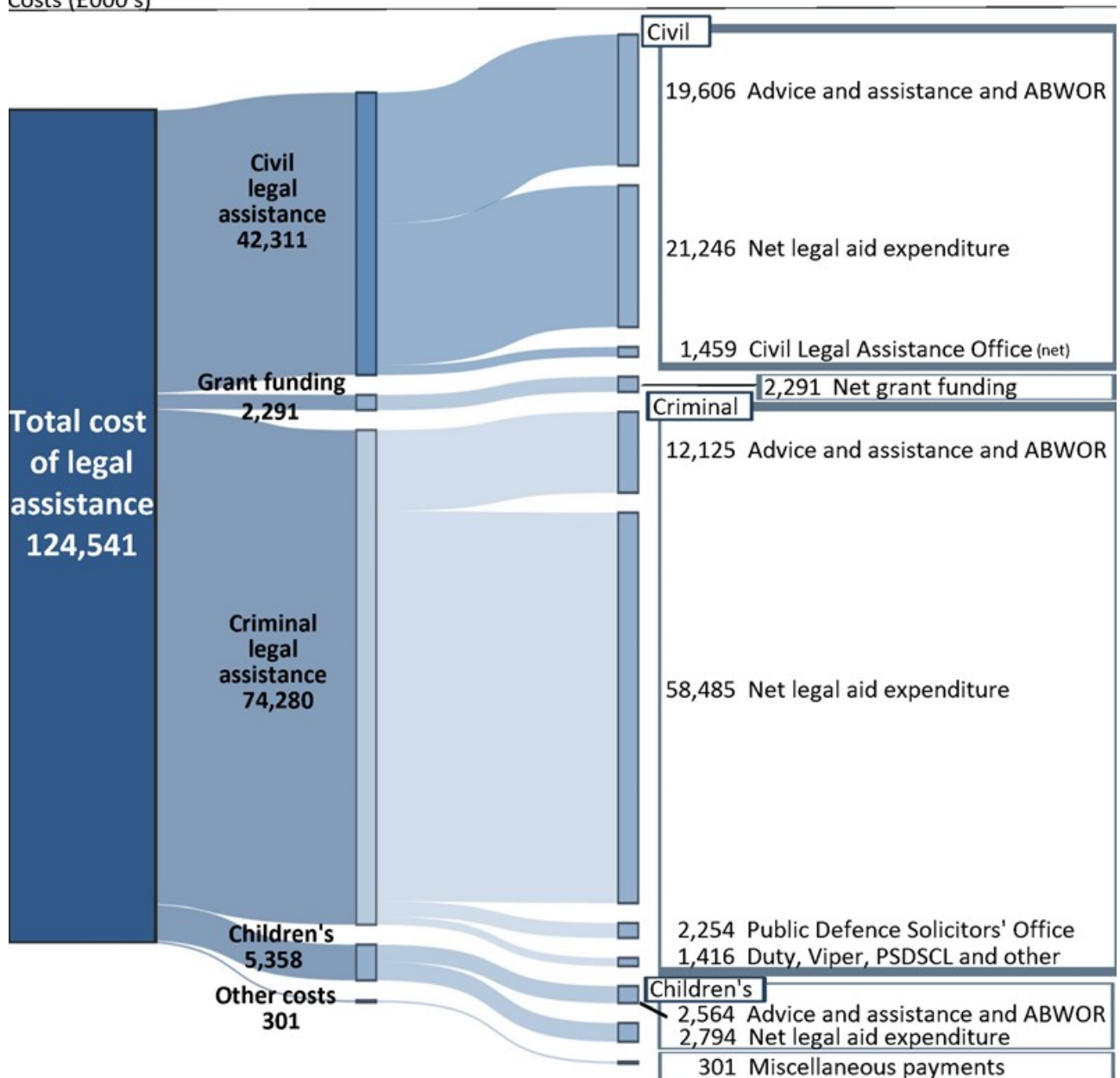
Legal disputes

151. As the graphic below shows, the bulk of expenditure from the legal aid fund supports criminal legal assistance services (around 60%), with civil legal assistance accounting for a further third of spend. Within civil legal assistance, the main areas of spend are family actions, adults with incapacity guardianship applications, mental health tribunal representation and immigration and asylum cases.

²² This sets out our response to: Would you support the availability of funding to those with a common interest in legal proceedings, such as Fatal Accident Inquiries?

Figure 3: Total cost to the taxpayer of legal assistance, 2017/18

Costs (£000's)



152. Representation is restricted to a number of named fora. There are different eligibility tests for different types of disputes and in different tribunals and courts. A public service approach would suggest the formulation of a clear statement of policy objectives and criteria to guide whether specific proceedings should be in scope and on the application of which test. With such a clear statement of policy from which criteria could be derived, SLAB could, subject to clear governance rules, be able to put in place the appropriate assistance to any new proceedings or change of forum. This would avoid the need for determinations or regulations when new procedures are developed in courts and tribunals.

153. As set out in the consultation, a feature of any new system should be that legal aid funding is more easily available where the Government expects it to be. The current legislative framework inhibits this due to way in which extending legal aid cover to new proceedings has to be done- by determination and regulation.

Activities

154. The range of activities we can pay for from the legal aid fund is restricted by the terms of the legal aid schemes. A general power to fund IT systems, case management, and other tools and training which could improve the efficiency and reduce cost in judicare funding, such as for the editing and tagging of video evidence, could help drive efficiency in judicare if we were able to fund on the most efficient basis.

Who can provide services in judicare

155. Judicare is only available to fund solicitors and advocates to provide advice and representation. This reflects the regulatory frameworks which were available when legal aid was first introduced. There are now other regulated providers of particular types of advice who are currently excluded from the scheme. Immigration advisers are regulated by the Office of the Immigration Service Commissioner, with three distinct levels of competence. At the highest level they can provide advice up to and including an application for judicial review of immigration and asylum matters, once they have been approved via competency assessment.²³ Approved DAS money advisers²⁴ include insolvency practitioners who are regulated by ICAS25 or the IPA.²⁶

156. Work that is currently paid at the “unqualified rate” or work done by advisors and paralegals, which is not currently payable under the 1986 Act, could be brought into scope for payment under current or any new funding model. The mechanisms for payment are currently under consideration by the Legal Aid Payment Advisory Panel and these could include payment differentials according to professional status or otherwise, such as by competence or experience.

157. One method of quality assuring payment for services provided by lay advisers would be through commencing provisions which would allow SLAB to register advice organisations and, for specified types of case, pay these organisations for advice and assistance provided by their staff.²⁷ These provisions could allow payment to paralegals for the work their supervising

²³ <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser>

²⁴ <https://www.aib.gov.uk/das/money-adviser#whatdoesDASapprovedMAAdo>

²⁵ <https://www.icas.com/regulation/practising-certificates>

²⁶ <https://www.insolvency-practitioners.org.uk/insolvency-practitioner/becoming-an-ip>

²⁷ <http://www.legislation.gov.uk/ukpga/1986/47/part/II/crossheading/register-of-advice-organisations>

solicitor states that they are competent to do and provide funded support for mainstreaming a model of provision which has solicitors and advisors working together.

158. The current provision could be extended to include other forms of legal aid and ABWOR, in addition to the uncommenced provisions for advice & assistance as a means of reforming this aspect of scope.

Changes that would support and strengthen the work of SLAB

159. Our current functions are:

- a. securing that legal aid and advice and assistance are available in accordance with the Act
- b. administering the legal aid fund, and
- c. monitoring the availability and accessibility of legal services

160. In the event that in seeking to move to a public service model government moves towards a system based on entitlement rather than one based almost solely on eligibility, then SLAB would require a function to connect entitled people to services and means to achieve that. This consultation seeks to test the public's appetite for radical reform; once known and the government have decided on a direction, further thought will be required on how that would reshape SLAB's range of functions. This response is organised around our current functions.

What would support our function of securing that legal aid and advice and assistance are available in accordance with the Act

161. We have set out possible future models for directing services in response to user needs. In any model which includes either directed or undirected judicare paid on a case by case basis, mechanisms which support more frequent payments to solicitors through the lifetime of a case, could usefully be introduced to improve businesses cashflow. This would be possible if the legislation allowed for payments to firms (not individual solicitors) and there was a power of recovery and set-off to balance interim payments against final accounts. This would underpin the use of interim payments in a wider range of circumstances. A single grant of legal aid could also reduce judicare complexity for the solicitor and clients. Both a single grant regime and resetting the relationship with the firm, could reduce the case by case burdens on firms and support this general function.

162. A consistent set of powers for SLAB in relation to targeted services would enable SLAB to support priority activities using the most appropriate funding model. For example, the current legislation allows contracts to be let for children's legal assistance - meaning direct advice and representation; separately it allows for grants to be made available where the purposes are facilitating, supporting and developing the provision of children's legal

assistance. Under a grant, we could fund IT systems, case management, and other tools - but not under a contract.

What would support the administering fund function

163. There is a lack of flexibility in the 1986 Act to respond to changes in the justice system or wider society. A number of technical fixes are required, including those set out here.

164. In order to help respond to future technological changes, provision for fully electronic applications would allow SLAB to dispense with the need for a signed declaration from an applicant and solicitor and move applications onto a fully digital footing. Other changes which could be more administrative and principles based in future include changes to the rate of interest payable by SLAB or on debts owed to SLAB which is currently set in statute as the judicial rate. This is out of step with most other public services and we suggest applying rates of interest used by other statutory bodies such as HMRC or tied to the Bank of England rate, or other alternatives that reflect wider economic conditions. This would assist in making the schemes fairer to administer, which was a theme of the Review.

165. Other changes that could help us carry out our role more efficiently include changes to the statutory framework to allow us to specifically share information in line with all usual and lawful activity under the Act, or under any other Act or as a matter of legal requirement. Similarly, adding requirements on other bodies to share information with SLAB is necessary to bring the legislation into line with modern data sharing arrangements. This would fit with the strategic aim in the Review of developing effective oversight for legal aid funding.

166. Sections of the 1986 Act relating to expenses, property recovered and preserved have become confused. So, for example, we retain the requirement to make deduction of the net liability on the Fund from property recovered or preserved, but we no longer have a definition of “net liability on the Fund”. Nor do we have the aggregation provisions beneficial in cases where an applicant has both advice and assistance and legal aid.

What would support the monitoring function

167. SLAB’s function of monitoring the availability and accessibility of legal services could be enhanced by the provision of objectives or purpose in regulations or in a schedule. Alternatively, Scottish Government could provide guidance to SLAB on priorities for the monitoring function.

168. More flexibility would be of benefit to the end-user, service providers and the wider justice system in that statutory processes can set the boundaries of good governance of a flexible and permissive legal aid system. A reliance on regulations for some technical fixes has proved cumbersome and reduced our responsiveness to changes elsewhere in the justice system.
169. A more flexible and principles based statutory framework could allow for change to the framework:
- a. via regulations (for change to the principles of who and which types of dispute are in scope), or
 - b. via consultation subject to Ministerial approval (in line with current arrangements for the Codes of Practice) for changes to upgrading of payments or detailed eligibility and
 - c. SLAB directed change, in line with a statutory purpose and set of principles for the legal aid system.
170. This type of approach would allow adjustments to legal aid to support changes in the justice system and wider societal changes.
171. In the event that SLAB becomes responsible for the decision making and implementation of larger programmes of targeted funding as a standard means of directing the Legal Aid Fund, then additional scrutiny and accountability for spend is appropriate. This might involve SLAB identifying specific priorities under broad Ministerial direction through consultation and engagement with sectors beyond the legal profession; choosing between direct services, contracting, or grant funding routes to delivery; gaining approval from Ministers for these plans; and being scrutinised on the achievement of outcomes and objectives by Ministers or by Parliamentary Committee.
172. If the amount of funding directed by SLAB increased, we would expect Parliamentary scrutiny to increase, for both Ministers, the Accountable Officer and SLAB's Board. In the event that government mandated a role for local government in the setting and agreeing local targeted funding, additional scrutiny of SLAB and risk would come from being accountable to both local and central government, which may have different expectations of legal aid as a public service.
173. An increased and substantial spend on targeted funding could also see a consumer panel embedded into the decision making processes. A consumer

²⁸ This includes SLAB's responses to: Do you support there being statutory processes that allow SLAB to facilitate legal aid delivery in a more flexible and permissive way? What checks or controls would you consider necessary if SLAB had statutory powers to operate more strategically?

panel with accompanying engagement and research strategy could submit advice to SLAB for consideration, bringing accountability for choosing to address some areas of need rather than others. Annual budget setting could be accompanied by Parliamentary scrutiny or Best Value review by Audit Scotland where there is substantial targeted funding.

174. As set out in illustrative Model 5, governance could be aligned to the recommendations in the LAR: Ministers could be responsible for setting SLAB's budget, but otherwise all other decisions and policy development could sit with SLAB's Board under a new legislative framework which defined in statute the outcomes for legal aid funding to achieve.

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

175. Under the 1986 Act, our Board must contain two members of the Law Society of Scotland, two members of the Faculty of Advocates and one member with experience and knowledge of the court system (which in practice has tended to be a Sheriff) in a Board with a maximum membership of 15. This reflects the Act's focus on the primary relationship between SLAB and professionals, rather than end-users. This requirement could be reviewed to reduce or remove mandatory representation, although we expect we would always need legal expertise on our Board.

176. The appointment process for public appointments has changed considerably since 1986 and the general public appointments regime now works to provide the optimal mix of interests, skills and diversity on any public board.

177. We work closely with Government to ensure that recruitment of Board members is focussed on those specific skills we require. Accordingly any future change in our role may see us seek different specific skills, including relevant legal skills.

Standard range of interventions, grants and contracts²⁹

178. SLAB's view is that it would be beneficial to have a standardised range of intervention powers across all legal aid types, regardless of the degree of change envisaged. The current powers are inconsistent. Powers for grant funding, contracting, directly employing solicitors and advisers; along with provisions that could make these exclusive, cover judicare, fund legal services outwith judicare structures, ancillary support services and/ or infrastructure support should be consistent across all interventions and aid types.

²⁹ This includes SLAB's responses to: In principle, do you support a change whereby SLAB would have a standardised range of intervention powers, in statute, across all legal aid types? Should grants and/or contracts facilitate exclusive funding arrangements to target a specific identified need? Should grants and/or contracts be able to cover all aid types?

179. A full suite of powers across all aid types could be used to give effect to the Government's policy intent for any particular set of circumstances. At present, the legislation is complex and would not allow for the range of interventions identified on pages 36 and 38.

Solicitors providing PFLA located within 3rd sector orgs

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?

180. SLAB's experience suggests that co-location, linking or direct employment of solicitors by third sector organisations could have a place in a future legal aid service, but each proposal would need to be considered on its own merits and considered in terms of regulation of solicitor services.

181. Direct employment of solicitors by third sector organisations is a question essentially about regulation of solicitors providing direct advice to the public, as such it is a matter of regulation and for the regulator. We consider that there is potential for strategic misalignment between the aims of a third sector campaigning organisation and the role of a solicitor in serving the interests of each client individually.

182. SLAB's experience of embedding solicitors within third sector organisations to provide advice directly to clients in Part V Projects³⁰ suggests that professional support and supervision are important aspects of the design of any project. We also note that the demand for casework might not necessarily be as one would expect. An evaluation of Part V Projects in 2007 identified that embedding was viewed by project solicitors as very useful at set-up phase, but became less important once relationships with the host and a range of local organisations had been established. A common feature of projects where casework was undertaken was that it can crowd out other development or non-frontline work (such as training, promotion or second tier advice). Co-location of legal services and advice services in other settings (such as health care) has been shown to work in some circumstances, but success is dependent on careful project design in each case.

183. Linking third sector organisations to solicitor services could be achieved through second tier advice models. This was the basis for a successful CAS Project in the Highlands and Islands, as well as being used in a number of other Part V projects and by other organisations, such as Enable. Second tier means advice is given to an adviser who is dealing with a case, rather than to a person directly. This can increase the confidence and capacity of advisers to deal with more complex cases and be used to identify specific training needs. As with

³⁰ Projects where bids were invited for SLAB-employed solicitors to be based in organisations supporting vulnerable groups. The employed solicitors worked closely with local advice agencies to improve their ability to provide advice and to make appropriate referrals to solicitors.

embedding solicitors, the particular strengths or weaknesses of the model depend on the context in which it is used and the outcomes being sought.

SLAB to employ lay advisers

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?

184. We assume this covers all aid types and that services in this context means both legal advice and representation, whether delivered by advisers or solicitors, and (for example) more general support or health services. We assume this could tie in to wider PFLA arrangements, rather than solely those funded through the Legal Aid Fund.
185. Under our Part V provisions, SLAB currently employs two support staff who take initial case details from contacts to the CLAO service and help signpost or refer them to other services. Where contacts are referred, they may also receive initial advice from a CLAO solicitor. Directly employed lay advisers, in a newly configured service could provide that initial advice in specific case types. The wide-ranging nature of problems presented to the CLAO service mean that we restrict our current service to signposting / referral to advice services, some support services and legal advice.
186. The key to any signposting or referral activity is that there are relevant services, with known capacity, to pass contacts onto, whether funded by SLAB or by another public authority. Understanding which advice and representation services are available and open to referral could be an outcome of work around enhanced PFLA connectivity. The degree of certainty that services can respond to referral will increase as any future model moves towards Model 5.

Benefits of telephone triage³¹

187. As set out in the consultation, we assume Scottish Government are primarily interested in this service to “address difficulties in securing access to advice experienced by certain user groups and aid early resolution of disputes” and that the focus is therefore on civil disputes.
188. SLAB has experience, on a small scale, of running a particular type of civil telephone triage service through the CLAO (as outlined at paragraph 131). Our experience suggests that an open service - which takes calls from the public on any issue that may be perceived as legal - can generate a lot of activity, but fewer than half of the people contacting CLAO require solicitor intervention.

³¹ This includes SLAB’s responses to: Do you think there would be benefits to having a telephone triage service that provided basic advice and referral assistance? If such a telephone triage service were implemented, what criteria should be used to identify the most appropriate organisation to deliver this service?

Although the CLAO service can signpost to solicitors in private practice, there is no compulsion on solicitors receiving referral to take clients on a formal referral mechanism (for example where full case details are provided to the solicitor from CLAO and/ or the client receives a set appointment time that is brokered by CLAO).

189. A review of early intervention as it relates to legal services³² suggests that those groups who face most access to justice difficulties are least likely to take action “early” or to benefit from less intensive interventions. These are primarily those people who are most disadvantaged and lacking legal capability. Legal services are engaged at crisis point by these groups.
190. We can therefore see benefits from a triage service where there is a clear set of justiciable issues that are in scope and there are appropriately intensive legal services to refer clients onto. These might be key criteria for developing the service. We have illustrated a potential role for such a service in Model 5. Specific criteria required to appraise bids to operate a service can only be developed once more detail about the aim and scope are known.

Channel shift

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?

191. Scottish Government sets out the aim of channel shift as being to enable members of the public to be better equipped to resolve issues themselves through reliance upon a trusted medium of advice provision. We assume that this covers all areas of law, although it may have most relevance for civil law issues. We assume that financial and merits eligibility tests can be met by telephone and online services, where required.
192. Whilst SLAB has developed online interactions with solicitors and provides duty telephone advice for suspects in police stations, our other directly employed solicitors services are constrained by the wider operation of the justice system and the particular vulnerabilities of their client groups. CLAO’s signposting and referral function is telephone and email based.
193. A range of more vulnerable groups may not have the capability to act on self-help advice as set out by Scottish Government. They would include those seeking advice for immigration and asylum, mental health, benefits, housing and criminal/children’s law issues.³³ If solicitor firms are to participate in the

³² <http://www.lawfoundation.net.au/ljf/app/&id=C52871BCF76CF60FCA257E70001DC9C3>

³³ <http://www.lawfoundation.net.au/ljf/app/&id=C52871BCF76CF60FCA257E70001DC9C3>

channel shift, this would need infrastructure funding and ongoing payment structures to support it.

194. A channel shift would drive down costs of individual transactions, but expenditure overall could rise depending on how the system was set up. Online systems for signposting, referral, advice and information could be an additional channel to provide a minimum basis of service for some areas of law that is supplemented by a system of judicare eligibility: for example, wills are eligible for legal aid, but there could be a consolidation and review of online advice to ensure up-to-date and quality guidance is available for all. The cost of developing content, then review and maintenance would likely be in addition to (and in excess of) the small sums currently spent on this area of practice under legal aid, rather than displacing it, as online provision may be effective for people not currently engaged with funded services.
195. As per our response at paragraph 190 on telephone services, online signposting and referral systems require a set of committed and responsive services to pick up clients.

Memoranda of Understanding

196. There are three questions around the proposal in the Review to use Memoranda of Understanding (MOU) to structure the relationship between legal aid providers and SLAB, which we answer in this section.³⁴
197. The current registration schemes for solicitor providers set some conditions on access to public funding; an MOU could enhance that.
198. An MOU with providers could help move the current system towards the aims set out for a legal aid service and characteristics of a public service that are given in the consultation.
- a. It could enhance the transparency of availability of services and have an indirect effect on the design and delivery of services, as firms would be prompted to consider their service offer in a way they might not have done before.
 - b. It could improve consistency of some service standards and information about service availability, but it would not enhance consistency of provision or the technical quality of advice.

³⁴ Do you support a Memorandum of Understanding between solicitor firms and the Scottish Legal Aid Board being a prerequisite for doing legal aided work? What should be contained in a Memorandum of Understanding to strengthen consistency of service and user centred design? What risks might a Memorandum of Understanding system have in relation to the legal sector's ability to respond to emerging legal need, if any?

- c. An MOU with signposting provisions would help identify already existing cooperation and collaboration across boundaries, but wouldn't provide a way to stimulate these or coalesce them around particular outcomes.
- d. The availability of accessible digital services could be made more transparent by an MOU, by identifying which firms provide digital services.
- e. If refreshed periodically, an MOU could help drive improvement in pursuit of Best Value, by raising the standards expected over time through its provisions.

199. We have identified an indicative list of the components which could be included in any MOU, subject to user and provider input. We would expect that any MOU must be developed and tested with users to identify those essentials of benefit to users and those of benefit to the funder (representing the wider public interest). Depending on the policy objectives sought from a system of MOUs, firms could be asked to, subject to any enabling change in the wider legal aid system:

- clarify what areas of law and types of case they offer under legal aid
- how they deliver their services (e.g. digital chat, office based, home visits) and to which geographic areas³⁵
- what other services they would signpost to (e.g. other legal advice, addiction services, housing options, benefits advice)
- confirm they have an equalities policy in place (as for some administrative requirements now, SLAB could provide some standard styles of policies and processes which meet the standard in an MOU)
- give a commitment to collect equalities data from clients.

200. These would be in return for defined service levels from SLAB such as:

- management information on their applications and accounts
- decision times for applications and accounts
- payment timelines
- identification and training on common problems with applications or accounts
- updates to publicly available information in a specified timeline if the firm's service offer changes
- referral or signposting from existing CLAO services or any expanded triage service, and duty services
- reporting on the equalities profile of applicants.

201. Further degrees of change could include stipulating some infrastructure requirements, such as IT equipment or office facilities to conduct business, or

³⁵ The payment system would need to accommodate these forms of delivery

particular service standards, such as minimum opening hours, voicemail facilities and maintaining an up to date website.

202. A commitment by firms to gather equalities data for applicants would enhance SLAB's ability to identify the advice and representation needs of specific groups who have been able to access judicare services. We are exploring ways of enhancing the collection of this data now, but an MOU could support this further.
203. A MOU would be unlikely to pose a risk to judicare's ability to respond to emerging needs. The key risk would be that, depending on the kinds of provisions included, firms may decide that the cost of compliance with the MOU requirements is not worthwhile and withdraw from providing legally aided services. This is most likely to be the case for those firms for which legal aid is a minor part of their overall business. We explore this and other risks to service delivery more in our partial benefits and risks analysis section.

Reform of judicare schemes

204. SLAB has some areas of discretion and flexibility under our current legislative framework, which are complicated by a primary statute and regulations that move from detailed prescription of what to take into account to more general provisions with discretion for SLAB. We are currently reviewing our approach to the application of the discretion provided by the Act and regulations.
205. This review will revisit our interpretation of statute, our policies for the application of discretion and the information we require to do so. This will form the basis of renewed guidance about how we make decisions, what we take into account and what we need from applicants and their solicitors. This will provide greater transparency and accountability for our decision making. As we proceed with this review we will also be looking for opportunities to simplify both the guidance and our business processes and to identify opportunities for legislative and regulatory reform where we are not able to make changes ourselves.
206. At this stage, we have conducted a high level analysis of the current framework and present this below; different aspects of the judicare schemes may be susceptible to reform by primary legislative change, secondary legislative change, direction or guidance from the government or changes to policy and business processes by SLAB. We are not focussing on the latter here, as such changes need no action by government.

207. We agree that the judicare system should be simplified, while retaining appropriate and proportionate controls so that the fund continues to be used for the purposes intended by Parliament. We assume that any form of judicare will continue to need controls on merits, costs and financial eligibility whether at the case, firm or solicitor level. A consistent set of quality assurance arrangements should also be part of that package of controls.
208. The development of a single or much simplified suite of aid types / grants or a comprehensive set of less burdensome controls on funded judicare activity would require legislative change.
209. Any reformed system will need to balance consistency and flexibility, simplicity and fairness. Those applying should have clarity over how decisions are to be taken and what information is going to be taken into account. It is both appropriate and desirable that how those decisions are made can change over time, via a transparent process, to respond to changes in the wider justice system or in the profile and needs of applicants.
210. For example, the profile of cases currently being marked for summary prosecution in the Sheriff Court means we could now consider a general policy approach to the application of the Interests of Justice test for such proceedings that reduced the need for additional information to support a grant i.e. our policy could be that it would always be in the interests of justice for legal aid to be made available for any case prosecuted in the Sheriff Court. This would increase transparency and predictability while reducing the burden on applicants and their solicitors to provide us with supporting information.
211. However, as the profile of Sheriff Court cases might change again in future, for example an increase in more minor offences with a lower likelihood of a loss of liberty or livelihood, or complex matters of evidence (some of the current factors we weigh in determining applications), we would want to be able to revisit the position without a need for fresh regulations.
212. Similarly, we can see that few people applying for children's legal aid are assessed as having to pay a contribution and of those who are due to pay a contribution, these are low value and, given the cost of enforcement relative to the value of the contribution, many end up unpaid. We may wish to have discretion to suspend the application of the means test as it presents a burden with little corresponding benefit, but remain able to reintroduce it if the profile of applicants changes.

³⁶ This section covers SLAB's responses to: Should judicare be simplified? Should SLAB have more flexibility in operating the system? Flexibility and fairness can trade off against one another. With this in mind: In which areas do you think it is most important to allow more flexibility? In which areas do you think it is most important to maintain consistency?

213. Where SLAB is given discretion, guiding principles or objectives would assist SLAB in deciding how to apply it. This could be set out in statute or by way of published guidance from Ministers. Such guidance would itself be transparent and open to scrutiny, as would the extent to which SLAB policy complied with the principles or guidance or was capable of giving effect to published objectives.

Financial eligibility³⁷

214. One key issue that could impact significantly on several aspects of the current judicare system is the approach to financial eligibility.

215. The current arrangements for assessing financial eligibility mean that people can be eligible for one form of legal aid funding, but not another. This can mean that the availability of legal aid funding changes over the course of a legal problem.

216. A single financial assessment early in the application process would be key to developing a much simplified system that has a single grant for most elements of a case. Significant simplification would require detailed development, testing and modelling and cannot be achieved without legislative change.

217. A single financial assessment would need to be simple enough to be applied by the solicitor, to avoid introducing delay at the early stage in a legal problem. A system of standard allowances could be introduced, although how that is constructed and maintained over time would be important to ensure both fairness and overall budget affordability.³⁸ Standard allowances would remove the need for verification of outgoings, leaving only income and capital to be evidenced.

218. Allowances would likely be based on household composition and the level at which they are set is crucial to whether those above the threshold could afford to pay for legal services privately, or pay a contribution. The particular level of allowance would be informed by the Scottish Government's policy on whether contributions are meant to be funding the schemes through full cost recovery, a nominal contribution to ensure the client has a stake in the conduct and cost of proceedings and/ or a public policy instrument to make subsidised legal services palatable to those who don't qualify financially for legal aid.

³⁷ This section covers SLAB's response to: Are there situations when the continuation of more complex financial calculations would be required? Should there be more strictly defined financial thresholds for eligibility? Do you support a single eligibility assessment at the earliest point in the application process?

³⁸ The Loughborough University report "Priced out of justice?" explores how standard allowances work in England and Wales for civil legal aid
<https://www.lawsociety.org.uk/news/documents/priced-out-of-justice-report/>

219. A system of standard allowances could cover the most common financial and household composition circumstances, but there may be some people for whom such allowances would result in an unfair assessment. This might mean undue hardship results from being liable to pay a certain contribution, or that they are assessed as ineligible when a detailed assessment may find them eligible. If the simple assessment is undertaken by the solicitor, they might ask SLAB to apply a more detailed test.
220. An important feature of such a system of personalised assessment is the need for verification of both income and outgoings to both assess financial eligibility and set the level of contribution. For people who mainly use cash payments,³⁹ their ability to provide evidence of outgoings is problematic and relies more on gaining documentation from other organisations (such as their landlord for proof of rent payments) than those who use other forms of payment that are tracked in bank statements. As a result, those who are perhaps least able to pay contributions may also be least able to demonstrate that they cannot do so.
221. A further way of redrawing the financial eligibility test would be to introduce a gross income cap to act as an initial filter. The Loughborough University report⁴⁰ "Priced out of justice?" includes an analysis of how a gross income cap operates in England and Wales. As with standard allowances, the level at which the cap is set is crucial to whether those above the threshold could afford to pay for legal services privately. It is also too rough a measure to determine whether or how much those below it could afford to pay as a contribution.
222. As Scottish Government state they wish people to contribute to the cost of the case where they can afford to do so, some allowance for family make up and financial circumstances seems desirable in a person-centred service. A gross income cap may not be nuanced enough to meet this policy objective.
223. Any redrawn test could be modelled to be largely cost neutral in that broadly the same proportion of the population would be eligible. A simplified test would however necessarily involve some movement between the eligible and ineligible populations, as high level filters and standardised allowances might bring some people into, or more fully into, eligibility who currently would not qualify or would have larger contributions, while excluding or increasing contributions for others. The winners in such a shift would likely be those with lower gross incomes and either lower outgoings or outgoings that are more difficult to evidence. Conversely, those with high gross incomes and high outgoings would likely lose out.

³⁹ Mainly those who are in poverty- <https://www.bbc.co.uk/news/business-47456698>

⁴⁰ <https://www.lawsociety.org.uk/news/documents/priced-out-of-justice-report/>

224. Scottish Government policy is that those who can afford to do so, should pay a contribution. Contributions are currently payable for some elements of criminal legal assistance covered by A&A and ABWOR, as well as for most aspects of civil and children's legal assistance. As set out in paragraph 217 to 219, how affordability is calculated is critical, but it can be achieved in various different ways.

225. If Scottish Government seek to reshape legal aid as a public service, the policy objectives for a contributory system could be reviewed. We have identified five possible policy objectives for a contributory system:

- a. to put a nominal value on the service to the public (not the same as the cost) e.g. as in dental charges,
- b. to interject a private client reality into the conduct of litigation and flatten out the advantage that the assisted person may have in litigation,
- c. to reduce the cost of the entire service by recouping contributions where possible,
- d. to increase the reach of the system by extending eligibility into a higher income band on the basis that the cost of such extended coverage would be met in part or in full by contributions, or
- e. to smooth the transition (in cost terms) from eligible to privately funded.

226. These suggested policy objectives are not mutually exclusive, but each might suggest different approaches to the calculation and fixing of contributory bands. The first would suggest a lighter touch to the assessment of contributions than the others, which might require a more extensive and complex calculation. Each of these objectives are present in the current system to a greater or lesser extent: a contribution as a nominal value in A&A and ABWOR (at least at the lower end of the contributory scale) and an objective to reduce the cost to the Fund, extend eligibility and smooth the transition from eligible to privately funded in civil legal aid. As Government seeks to reform the system, differing policy objectives should be reviewed in determining if, when and at what level contributions should be required.

⁴¹ This section covers SLAB's response to: Do you agree that those who can afford to do so should pay a contribution? Would you support the implementation of contributions in criminal legal assistance for those who can afford to pay? 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?

227. There are options to simplify contributions in relation to cases where the level of contribution is currently tied to the cost of the case.⁴² If a set amount of contribution was payable aligned with income (whether gross, net of allowances or assessed as disposable), then there would be more predictability about what a person had to pay at the outset. This would give effect to a simplified approach to achieving policy objective b, c and d.
228. The calculation of affordability of a contribution could be separated from the financial eligibility test; this would allow a simple eligibility test to co-exist with a nuanced affordability assessment.
229. If Scottish Government policy was to extend criminal contributions to a wider range of proceedings, detailed work would be needed on how best to implement the assessment and collection of the contribution. Similar work would be needed in relation to any early single assessment of financial eligibility and any contribution attached to that.
230. There are no sanctions for non-payment of contributions in the current Children's contributions schemes, nor in the draft criminal schemes which have not been implemented. In the absence of a sanction for non-payment it is worth reflecting on which policy objective is met by the assessment of a contribution (which is a cost on the system) and to what extent the policy objective is met.

Clawback⁴³

231. Clawback operates differently between A&A and civil legal aid. In A&A the scope of clawback is broader (attaching to property rights and property) but subject to the exercise of discretion by SLAB; in civil it attaches to property but there is no discretion as to whether it applies.
232. Clawback is one of the sources of income which currently reduces the net cost to the fund of the cases funded. The other income sources are contributions and expenses whether in civil or A&A (although any expense in A&A will be extra-judicial expenses).
233. We consider that there ought to be consistent provisions across A&A and Civil. Any test or exercise of discretion on the broader application of clawback ought to be based on a clear statement of the principles which the Government seek to meet in applying clawback and the principles of any test or discretion to disapply.

⁴² This occurs when the assessed contribution exceeds the expected or actual cost of the case, resulting in adjustment and readjustment of the amount payable as the case proceeds and, sometimes, refunds of contributions already paid when the case concludes.

⁴³ This covers our response to: Would you support that there be a test on whether clawback should apply? Would you support addressing this by removing discretion to create a more transparent system, even if this might risk some benefits of the flexibility of this discretion allows?

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

234. Other aspects of treatment of debt on termination of a certificate, clawback and expenses could certainly be streamlined. These include the requirement for SLAB to take in all expenses relating to a legally aided case, adding administrative steps. Powers and obligations in relation to termination for non-cooperation or failure to declare all income/ capital can lead to creation of debt where there is little chance of recovery. Powers to give effect to clawback are not helpfully framed, which limits their use. The policy intent behind these provisions could usefully be explored and potential alternatives constructed.

Merits⁴⁴

235. Overall, SLAB considers that the merits tests in place for judicare funding are set broadly at the correct level, although we can see scope for some simplification of these.

236. In paragraph 210 we suggest that flexibility in the need to apply the Interests of Justice test could be helpful in criminal, but not that the test itself is problematic. The multiplicity of merits tests for different people involved in children's legal assistance proceedings could be simplified, as could the definition of distinct proceedings which at present requires sometimes different tests to be applied on multiple occasions in respect of several stages of what might be considered to be the same case, but which are technically treated as separate proceedings.

237. The judicare schemes also have some elements of ongoing merits testing and we would envisage this being an important part of any move to more of a single grant structure in any form of assistance.

238. Currently A&A is available for any matter of Scots law and allows quick and easy access to advice from a solicitor, subject to the solicitor's willingness to use the scheme. This easy access could be jeopardised by a sufficient benefit test operating in addition to the current controls. There are different initial limits on expenditure for different case categories under the scheme, which afford some level of control over whether it is reasonable for further work to be undertaken. The control is double ended - it is applied both when requesting an increase in authorised expenditure and when an account is submitted - which is resource intensive for SLAB and can prove troublesome for the profession.

⁴⁴ This section covers SLAB's response to: Do you consider the merits tests appropriate and transparent? Would you support the introduction of any merits test on what is currently the advice and assistance scheme? In principle, do you support the application of a merits test at defined stages during the lifetime of a grant of legal aid?

239. At the accounts assessment stage, the work is evaluated against the taxation standard which in essence is whether it was actually, necessarily and reasonably done. The solicitor risks not being paid for work beyond the initial authorised expenditure if there is no stateable merit to the case such that further work is rendered unreasonable and/or unnecessary.

General controls⁴⁵

240. Any system involving the expenditure of public funds requires controls designed to ensure that public funds are appropriately spent for the purpose intended. Any change to the judicare system would prompt a re-examination of controls to ensure they are designed to be proportionate to the risk and to the funding mechanism. For example, any increase in the scope of work that can be undertaken without prior approval by SLAB would be subject to back-end checks that could result in no payment or recovery of any payments made (subject to appropriate powers of recovery and set off). Those could be designed as now, as case level controls, or in a system which is built around a partnership between SLAB and the firm, as firm level controls such as audit and restitution.

241. Consistent quality assurance arrangements at the firm and individual level are key under any system. The powers available to give effect to findings of non-compliance with quality assurance are limited and inconsistent across aid types. A greater range of powers, designed to protect the public purse and the public would allow for a more proportionate response to problems arising through the QA process. As an example, more proportionate remedies might include exclusion from or a restriction to a particular type of work only, or a requirement for appropriate training or supervision.

242. If payments to solicitors remain on a largely piece work basis, the foundation of the QA system (Code or Memorandum) or the regulations could usefully include a mechanism to challenge a pattern of charging which is significantly higher (or lower) than the average cost profile of other providers delivering a similar service. This would mirror the power in the regulations covering the publicly funded work of dentists.⁴⁶

243. Where there are multiple grant agreements or contracts setting the terms for delivery of legal aid, quality standards and audit could be built into either the grant agreement or contract or by reference to an external registration and quality assurance standard. In the event that government wanted to move in

⁴⁵ This section covers SLAB's response to: We are aware that in other jurisdictions, such as the Netherlands, applications are submitted under a high trust model and automatically granted, subject only to financial eligibility checks. What are your views on the current balance between a solicitor's ability to grant advice and assistance and the need to seek prior approval from SLAB for funding in other aid types? Do you think this balance should be shifted, and if so in what direction? In general, what controls do you think should be put in place to protect the Legal Aid Fund from inappropriate use?

⁴⁶ <http://www.legislation.gov.uk/ssi/2010/208/regulation/27/made>

the direction of Model 5 then contracts provide an opportunity for different controls. These could incorporate quality assurance arrangements or look to the totality of the publicly funded work done by a firm to check if there is preponderance of work that would not meet a sufficient benefit test, rather than focus on each transaction.

244. For example contracts could, as in England & Wales set a percentage of cases in which the contractor must achieve a substantive benefit for the client as a Key Performance Indicator (KPI). Failure to meet one or more KPIs may trigger an audit or further monitoring of the contractor's performance or be used in entry or selection criteria in future contracts. However any such system would need to take into account the value society places on the ability to exercise rights (such as the right to challenge a loss of liberty through detention in a mental health facility) and the benefit that people gain by exercising those rights, regardless of the prospect of success. Any such recognised values, or outcomes sought, could be built into any monitoring system and so would be subject to scrutiny and challenge at the policy rather than individual case or work item level.

Best value

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

245. As outlined in the section on Direct engagement through enhanced approaches to quality assurance, we consider that there ought to be a consistent approach and set of powers across all aid types and provider types (solicitors, firms, advocates, advisers and advice organisations) for audit and peer review, which together would make up a consistent quality assurance scheme across all legal aided services. A registration system could include the Memorandum of Understanding as the foundation document or an enhanced set of Codes of Practice.
246. A consistent approach across all solicitors providing services paid by the Legal Aid Fund could usefully include quality standards for advice, supervision, business systems and infrastructure required to deliver services to the client group, encourage firms to put in place plans to meet client needs which they cannot meet directly and improve consistent and equitable access to justice.
247. The Scottish National Standards for Information and Advice Providers (SNSIAP) already take this type of approach but could usefully be reviewed, in terms of their scope and depth of detail. These Scottish Government owned standards for certain categories of advice; debt, benefits and housing are not tied to any particular funding stream, unlike the solicitor peer review schemes which are tied to SLAB's funding. SLAB operates the SNSIAP accreditation programme, which includes peer review of quality of advice, but accreditation to the Standards can be relied on by any public funder.

248. The solicitor quality assurance schemes are tied to the funding streams. At the moment all solicitor services need to be registered with us before they can provide services funded by the Legal Aid Fund. Registration in criminal and children's legal assistance is required by statute and linked to adherence to a Code of Practice. Registration as a provider of Civil Legal Assistance in Civil is mandated by a Law Society of Scotland Practice Rule. The Law Society of Scotland maintains that Register and has rules in place to manage application to be on the Register and withdrawal from the Register.

249. There is also a statutory power for SLAB to register advice organisations for the purposes of providing case-by-case advice and assistance. That provision is as yet not commenced. There is currently no requirement for us to register advice organisations funded under our grant funding power, as there are other controls available to cover quality through the grant agreement with funded advice providers.

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

250. The Review's recommendation on publication was informed by a desire to improve public scrutiny, build public trust in legal aid, provide a competitive advantage for high quality providers and drive improvement by poorer quality providers. Whether publication is the most cost effective means to achieve the objectives identified in the Review will depend on how far Government seeks to reshape legal aid as a public service. Some of the objectives of publication (scrutiny and public trust) could be achieved at a macro level within a public service model, rather at individual business level.

251. Publication of quality assurance reviews and reports could be a mechanism to achieve the objectives identified by the Review if the degree of change in the legal aid system is minimal. However, even with a minimal degree of change we would not support the publication of those reports and audits. The current schemes are designed to drive continuous improvement and therefore contain information and feedback to assist a provider.

252. The public only becomes aware of the outcome of the current quality assurance scheme (by which we mean audit and peer review) for legally aided solicitors if and when a provider is deregistered and therefore not able to offer legally aided services. Continuing registration is a publicly available indicator that the outcome of the quality assurance processes has not required de-registration.

253. In the SNSIAP scheme, an organisation which successfully achieves accreditation to SNSIAP is information published on the Scottish Government website. The accreditation identifies which areas of advice accreditation has been awarded and what type (signposting, advice, representation). An unsuccessful audit or peer review in the SNSIAP process is not currently

published. The absence of accreditation may be a factor for funders when they make funding decisions to support advice services.

254. Enhancements to the quality assurance regime for legally aided services are considered in the section on Direct engagement through enhanced approaches to quality assurance. As part of any redesign, consideration should be given to whether the outcome of an overhauled audit and peer review scheme should be summarised to an easily identifiable accreditation which consumers could use to help choose a firm. The current legal aid peer reviews do not take account of the influence of a firm's quality and general management processes on an individual solicitor's peer review. Any review ought to consider opportunities to focus on the firm and the organisational arrangements for quality assurance.

Outlays⁴⁷

255. SLAB reports on the level of outlays being paid from the legal aid fund annually. Over the past five years, the proportion of total expenditure for outlays has been steady at between 12-14%. As noted in the consultation, SLAB is a funder, not a purchaser of services in relation to outlays, which cover a diverse range of things- from travel to expert witnesses and reports. The relationship is directly between the expert and the solicitor.

256. A preferred supplier list or a system where SLAB directly engages with experts would be likely to be classed as procurement and thereby it could add cost to the overall system of sourcing and paying for outlays, which would only be of benefit if it reduced the costs and improved quality of experts.

257. Some outlays are commonplace and are required to support a client's case and would be susceptible to standard charging in certain categories, such as medical reports to support a guardianship application.⁴⁸ SLAB would support a table of fees for these kinds of outlays, including curators and safeguarders. Other outlays are incurred from the wider justice system, such as shorthand

⁴⁷ This includes SLAB's responses to: *There are a number of approaches that could achieve greater surety and control over outlays. How desirable do you find the idea of the statutory framework to give SLAB powers to:*

1. *fix a preferred supplier list and to set rates for commonly used experts;*
2. *deal directly with the experts to arrange payment;*
3. *make payment on the basis of a fixed tables of fees for experts, which must be agreed to when accepting instructions relating to a legal aid client*

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

⁴⁸ AW1 report- <https://www.gov.scot/publications/guardianship-intervention-orders/#How%20to%20apply%20to%20become%20a%20guardian>

writers and child welfare reporters, which could potentially be funded from the budget of those approving the expense.⁴⁹

⁴⁹ The Children (Scotland) Bill policy memorandum identifies that Scottish Ministers, rather than SLAB, will become responsible for funding child welfare reports:
https://www.parliament.scot/S5_Bills/SPBILL52PMS052019.pdf