



FACULTY OF ADVOCATES

Response to Scottish Government's Consultation on Legal Aid Reform

This response has been prepared by the Faculty's Criminal Bar Association (FACBA). As such, it reflects the practical experience and insights of advocates practising in the criminal courts and should be read from that perspective.

Question 1 – As set out above, to what extent do you agree with the Scottish Government's proposed approach?

FACBA agrees with the Scottish Government's proposed approach. FACBA supports increased simplicity for users and providers of legal aid services, as long as it is married with increased effectiveness. FACBA further agrees that any changes to the legal aid system require to be clear, to be affordable and sustainable, and to be adaptable to alterations in technology.

Q2. Do you think it would be beneficial for Scottish Ministers to continue to set a clear purpose for the legal aid system, supported by periodically updated objectives for the Scottish Legal Aid Board?

Noting that neither the economy nor the law is static, FACBA agrees that it would be beneficial for the Scottish Ministers to continue to set a clear purpose for the legal aid system, and for there to be periodically-updated objectives for SLAB.

Q3. What principles, if any, should inform the purpose and objectives?

FACBA considers that the overarching principle of how decisions are made should be user-centred, assisted by statistical analysis of trends, from which funding needs might be ascertained.

Q4. Do you think these principles should be subject to Parliamentary scrutiny?

Being the representative body of the electorate (and thereby the tax payer base), FACBA considers that the principles should be the subject of Parliamentary scrutiny.

Q5. Which of the following benefits, if any, do you think simplification would provide?

FACBA considers that simplification, if implemented correctly, would result in easier access for users, reduced administrative burdens for providers and for SLAB, faster decision-making, improved consistency and better use of public funds, beyond which FACBA has no concluded view.

Q6. To what extent do you agree with the proposal to consolidate or streamline, where possible, the current range of separate aid types?

FACBA agrees with the proposal to consolidate or streamline the current range of separate aid types.

Q7. To what extent do you agree or disagree that contributions and repayments arrangements should be simplified?

In the limited number of cases involving FACBA members that involve contributions and repayments, FACBA supports the simplification of those arrangements. Beyond criminal law matters, FACBA has no position.

Q8. To what extent do you agree or disagree that contributions and repayment arrangements should be made more consistent across all types of legal aid?

Since FACBA as a body relates to criminal law practice, FACBA has no position in relation to other areas of law.

Q9. What changes, if any, should be made to contributions and repayment arrangements?

FACBA recognises that publicly funded civil practitioners will inevitably have a wider knowledge of the contributions and repayment arrangements, and that those in the solicitor branch of the profession will undoubtedly have even more, and FACBA therefore defers to those with a greater knowledge in this area.

Q10. Do you agree that eligibility for legal aid should be clearly separated from the assessment of what a person is required to contribute?

Insofar as this might relate to criminal cases, FACBA agrees that eligibility for legal aid should be clearly separated from the assessment of any required contribution.

Q11. To what extent do you agree or disagree that the Scottish Legal Aid Board should have a bi-annual statutory duty to review and advise on contribution thresholds and arrangements?

FACBA observes that a bi-annual duty to review and advise may run counter to the concept of simplification, and that an annual duty may suffice.

Q12. Are you in favour of a higher trust model for accredited providers?

FACBA notes that a number of matters require a specific grant of sanction from SLAB above and beyond sanction to instruct counsel (eg consultation with an expert, and counsel's attendance at a first diet). FACBA is supportive of a higher trust model wherein the accredited instructing agent could sanction such matters.

Q13. Are you in favour of data sharing between organisations (such as the Scottish Legal Aid Board and Social Security Scotland) to ease the passporting of benefits?

Insofar as it is advantageous to the process of criminal legal aid grants, FACBA is supportive of such a measure, beyond which it falls outwith FACBA's purview.

Q14. Which funding models do you think should be used more in future?

As far as funding of counsel in criminal cases is concerned, FACBA considers that case by case funding is the appropriate model. Any other model runs contrary to the role of members of FACBA as an independent referral Bar.

Q15. Are you in favour of services being commissioned directly in line with the approach set out, for example through grants/contracts or direct employment?

FACBA opposes grants/contracts or direct employment as far as the representation of accused persons in cases meriting the instruction of counsel, for the reason given in answer to Q14.

Q16. Do you consider that the scope of legal aid in Scotland should continue to be focused on individuals, or are there circumstances in which non-natural persons should be eligible for support?

Albeit the number will be extremely limited, FACBA considers that there are circumstances in which non-natural persons should be eligible for support, for example where bodies corporate are prosecuted.

Q17. To what extent do you agree with the split of duties between the Scottish Parliament, Scottish Ministers and the Scottish Legal Aid Board?

FACBA agrees with the split of duties between the Scottish Parliament, Scottish Ministers and SLAB, and the preservation of decision-making on individual grants of legal aid which is independent of government, other than in a limited number of cases where it is the Scottish Ministers themselves who make the decision about legal aid under section 4(2)(c) of the 1986 Act.

Q18. Which of the following planning and reporting requirements do you think should apply to the Scottish Legal Aid Board under any new scheme?

FACBA considers it appropriate that regular SLAB reporting to and review by the Scottish Government, and a less regular review by the Scottish Parliament is an appropriate model to ensure that the proposed changes achieve their goals.

Q19. Do you think there should be powers to act if the Scottish Legal Aid Board is not able to deliver the objectives of the legal aid system?

FACBA agrees strongly that there should be powers to act if the Scottish Legal Aid Board is not able to deliver the objectives of the legal aid system.

Q20. Who should have powers to act if the objectives of the legal aid system are not being delivered?

FACBA considers that both the Scottish Government and the Scottish Parliament should have powers to act.

Q21. What types of powers should be available?

FACBA considers that the powers available should include the direction to SLAB to take action, the commissioning of independent reviews, and the changing of governance arrangements. It is further considered that the setting and changing of performance targets is a power best held by the Scottish Government.

Q22. Overall, how would you characterise the likely impact of the proposed reforms?

FACBA considers that the laudable aims of the proposed reforms, if executed properly, will likely have a positive overall impact. Increases in simplicity and efficiency will result in financial benefits to the system. Increased certainty in what will be funded and at what level will provide budgeting advantages to providers. Proper execution of aims of the proposed reforms is where, however, the rubber meets the road.