

Introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility: A Consultation Paper



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Scottish Legal Complaints Commission

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Agnew

Forename

Rosemary

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

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

Please tick as appropriate Yes No

CONSULTATION QUESTIONS

This questionnaire is intended for you to respond to the questions raised within the consultation paper.

We have presented the questions which appear in the consultation in full below. They are in the same order with the same numbers as in the consultation paper, with space for you to answer.

Please read through the consultation paper and then record your answer to each question in the space provided. You may answer as many questions as you wish; you do not need to answer all the questions if you do not wish to do so.

If you require further space for your response to any of the questions, you can continue on a separate page. If you do this, please state the number of the question to which your response refers.

Governing principles

Q1. Do you agree with the five governing principles (pages 8 & 9)?

Yes No

Why?

The SLCC supports the principle outlined in the consultation paper.

The SLCC's view is that there should be a straightforward and easily applicable system for applying the changes to financial eligibility and to the collection of financial contributions. It is important that consumers can access, understand and use the system proposed. Practitioners similarly need to be able to advise their clients about the applicability of such a system and apply the appropriate rules and regulations so as to provide their clients with a proper and thorough service. It seems sensible to adopt an online service (where available) in order to ensure that applications are dealt with as expeditiously and efficiently as possible.

Practitioners also need to make it clear to their clients what the client is required to pay and to whom, and how this will be deducted from the solicitor's account by the Board at conclusion of the action. It is good practice to send clear and comprehensive Letters of Engagement to clients to ensure that they are made aware of all relevant information, thus avoiding confusion on either side. The SLCC has received complaints about the content and quality of Letters of Engagement and overtime it may be necessary for the SLCC (or the Law Society of Scotland) to issue (further) guidance to ensure that sufficient information is being provided to clients at the appropriate time.

The SLCC recognises the need for practitioners to be properly trained to apply any new provisions. The SLCC also suggests that the Scottish Legal

Aid Board might consider putting in place a system of monitoring and scrutinising such applications to ensure that practitioners are following the appropriate application procedures. The aim would be to minimise the potential for complaints and allegations of abuse of process and to ensure consistency of application across the profession throughout Scotland.

Do you wish to make any further comments on these principles?

The SLCC is an independent and impartial complaints handling organisation which deals with legal complaints in an objective and fair manner.

It is within the SLCC's remit to:

- receive, process, refer, investigate and determine complaints about the service provided by legal practitioners in Scotland;
- provide advice to the legal profession and complainers about the complaints process; and also
- drive-up standards in the legal profession through its oversight functions, including (a) monitoring and identifying trends in practice about the way in which practitioners have dealt with matters which result in legal complaints being remitted to the SLCC, and (b) issuing guidance and recommendations to legal professionals as respects their standards for systems for dealing with such complaints.

Whatever changes are introduced to the existing Criminal Legal Aid system in terms of financial eligibility and contributions, it is highly likely that the SLCC will continue to receive complaints about how legal practitioners manage Legal Aid applications during the course of providing legal services to their clients.

In the SLCC's experience, clients have complained about a range of issues relating to both the application of both Civil and Criminal Legal Aid, including issues relating to:

- (a) the alleged failure by solicitors to make appropriate enquiries regarding a client's eligibility for Legal Aid;
- (b) the alleged failure to ensure that the firm's Letter of Engagement clearly set out the basis of any Legal Aid contribution;
- (c) the alleged failure to obtain sanction for expenses from the Scottish Legal Aid Board before undertaking to pay for the instruction of an expert witness;
- (d) submitting an inaccurate account to the Scottish Legal Aid Board;
- (e) the alleged failure to advise of the existence of the Legal Aid Scheme;
- (f) the alleged failure to submit Legal Aid application forms, despite having undertaken to do so;
- (g) the issuing of a private fee note whilst the client was in receipt of Legal Aid;
- (h) allegations of misleading, dishonesty; delay; and failing to adhere to the Law Society's Guidelines in respect of issues concerning Legal Aid; and
- (i) the alleged failure to effectively carry out the eligibility assessment and adhere to the rules and regulations governing the existing legal aid application process.

In light of the above, the SLCC is keen to ensure that the ability of solicitors to deliver good standards of service is maintained and is not in any way hindered by the proposals for change to the present financial eligibility process. Our concern is that any changes to the system are implemented properly, that is: properly notified to those solicitors who will be practising in this area and that they are adequately trained and monitored to ensure that the process is being suitably applied. This is important to reduce the potential for complaints, including allegations of dishonesty or perverse incentives on part of the practitioners, and also to ensure that consumers have confidence in those professionals who offer legal services under such a scheme.

Proposal 1 – Changing the assessment of financial eligibility

Q2. Do you agree that the assessment of financial eligibility for Assistance by Way of Representation (ABWOR), summary and solemn criminal legal aid should be similar (pages 10 & 11)?

Yes No

Why?

As an independent and objective complaints handling body, the SLCC has no particular comment to make on the practical application of the proposed changes to the financial eligibility/contribution system. The SLCC would only seek to reiterate that the process adopted should be as streamlined and straightforward as possible for ease of access by all involved in the application process.

Q3. If you answered ‘yes’ to Q2, which one of the two options suggested would you prefer and why (pages 10 & 11)?

Introduce a unified test based on the ‘undue hardship’ test

Maintain the current financial eligibility test for ABWOR but increase the upper income limit to a level equivalent to summary criminal legal aid

Reasons for choice?

The SLCC has no comment to make in this regard.

Are there alternative options?

The SLCC has no comment to make in this regard.

Do you wish to make any further comments on proposal 1?

The SLCC has no comment to make in this regard.

Proposal 2 – Introducing contributions in criminal legal aid

Q4. Do you agree that criminal legal aid should be brought in line with advice and assistance, ABWOR, civil legal aid and children’s legal aid so that those who can afford to pay a contribution towards the cost of their case should do so (pages 12 to 15)?

Yes No

Why?

The SLCC has no comment to make in this regard.

If contributions were to be introduced, please provide responses to the following questions:

Q5. Do you agree that for income-based contributions it should be a graduated contribution scheme, similar to that introduced in civil legal aid (page 12)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Q6. Do you agree that for capital-based contributions, if the applicant has disposable capital over a stated upper limit which is less than the average case cost, the disposable capital over the upper limit should be paid as a contribution towards the cost of the publicly funded representation (page 13)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Q7. Do you agree that where the applicant has both available capital and income that the contribution in the first instance should come from the available capital and then from the available income (page 13)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Q8. In the case of criminal legal aid for appeals, do you agree that a similar provision that is used in civil legal aid and children's legal aid be introduced (page 13)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Q9. Which of the following options for payment periods involving income contributions would you prefer and why? Please select only one option (pages 12 & 13).

Paying contribution payments over the lifetime of the case (to the point of sentencing) up to a maximum of the cost of the case

Paying contribution payments over set periods depending on the type of legal aid

Combine the two options above so that if the case is not complete by the set period, the weekly graduated contribution would be payable for the lifetime of the case up to a maximum of the average case cost or the solicitor's estimated cost

Reasons for choice?

The SLCC has no comment to make in this regard.

Any other suggestions?

The SLCC has no comment to make in this regard.

Q10. Do you consider there are any circumstances in which it should be possible for an accused person to recover contributions in criminal legal aid (pages 14 & 15)?

Yes No

If yes, what circumstances?

The SLCC has no comment to make in this regard.

If no, why?

The SLCC has no comment to make in this regard.

Do you wish to make any further comments on proposal 2?

The SLCC has no comment to make in this regard.

Proposal 3 – Collection of contributions

Q11. In your opinion, who should collect the contributions and why? Please select one of the following options (page 18):

Solicitors should collect all contributions

The Board should collect all contributions

The Board and solicitors should share the responsibility for collection of contributions

Reasons for choice?

Whatever decision is taken in this regard, the SLCC's view is that this decision needs to be properly recorded on the practitioner's file and also notified to the person making the contribution in a clearly set out Letter of Engagement. Practitioners need to ensure that appropriate systems are in place to:

- (a) collect contributions from clients;
- (b) record contributions received; and
- (c) provide clients with a written receipt and final account.

Any failure to make the position absolutely clear or to issue suitable accounting may be met with a finding of inadequate professional service by the SLCC or a referral of a potential conduct complaint by the SLCC to the Law Society of Scotland.

Do you wish to make any further comments on proposal 3?

The SLCC has no further comments.

Enforcement of payment of contributions

Q12. Do you agree that consideration should be given to introducing enhanced powers of recovery to ensure that applicants pay where they are able to (page 20)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Q13. Should legal aid be terminated in less serious cases if the assisted person decides not to pay or stops paying the financial contribution (page 20)?

Yes No

Why?

The SLCC has no comment to make in this regard.

Do you wish to make any further comments on enforcement of payment of contributions?

The SLCC has no comment to make in this regard.