

Legal Aid Reform in Scotland

Consultation

The Scottish Government Analysis

June 2020

1. The Consultation Exercise

1.1. Why did we consult?

The Scottish Government is committed to improving legal aid in Scotland. The Independent Strategic Review of Legal Aid, chaired by Martyn Evans, had provided a ten year vision of a citizen-focused legal aid and advice service in Scotland, underpinned by 67 recommendations. The Scottish Government has kept open its view on how best to deliver the longer term aims, and in its response to the Review signalled its willingness to take forward supported recommendations that would deliver an enhanced system of legal aid.

The Scottish Government Response also contained a commitment to consult on reform. Consultation is an essential part of the policy making process, and to assist with the development of appropriate legal aid reforms, a public consultation ran between 27 June and 19 September 2019. This consultation sought views to help inform the development of legislation that will achieve the Scottish Government's long term vision of Scotland as a global leader in supporting citizens to defend their rights, resolve problems and settle disputes while creating and sustaining public trust and provider confidence in legal aid.

1.2. What did the consultation ask?

The consultation was intentionally broadly set to capture the fullest range of views on the recommendations and what level of reform is supported. In particular views were invited on how best to develop a public service that has the user at its centre, with sufficient flexibility to address and adapt to user need. These areas were identified as the foundations for change to the existing system, in Part 1 of the consultation. Such change would promote a major shift in how legal aid policy is formulated, how legal aid services can be delivered, and how legal aid is perceived.

The consultation then invited more in-depth consideration around how the change agenda could be delivered, in Part 2 of the consultation. The key themes were scope and oversight; improving access and targeted interventions; simplicity and fairness and enhanced powers and best value.

The consultation recognised the importance of facilitating access to advice and representation, in addition to retaining that legal aid be available for a wide scope of actions. Therefore, under "scope and oversight" it reaffirmed that the Scottish Government has no intention to reduce the wide scope of actions for which legal aid is available. It also stated that there was no intention to abolish the Scottish Legal Aid Board and set up a new public body to deliver a reformed legal aid system.

The section "Improving access and targeted interventions" examined how best legal aid can facilitate advice and representation needs be met in a flexible, planned and responsive manner. The premise here was that it is not enough to have a service that is available without considering how those who need it can access it.

'Simplicity and fairness' recognised the inherent tension between making access to services more simple and transparent against trade-offs such as potentially changing

the demographic of assisted persons if aspects of the existing eligibility models are removed. 'Enhanced powers and Best Value' invited views on what changes would be necessary to empower the Scottish Legal Aid Board to capture the user voice and to oversee delivery of a public service in a way that engages with Best Value.

The consultation expressly set aside the issue of payment in respect of legal aid fees, on the basis that this was subject to separate consideration by an advisory expert panel, chaired by the Scottish Government.

1.3. How did we consult?

Responses could be provided online through the Scottish Government's consultation hub, or submitted by email. In addition to the written consultation, the Scottish Government supported a conference on the consultation, hosted by the Legal Services Agency in Glasgow, to seek views and feedback on the main themes for change. Results from this event are not included within this report. Officials also offered to meet with each of the key stakeholders to discuss the consultation following its publication.

2. Methodology

2.1. The respondents

43 responses to the consultation were received. A further 18 emails were received from individuals from the legal profession simply endorsing either the response of the Edinburgh Bar Association (EBA) or Glasgow Bar Association (GBA), or on occasion both despite those responses taking differing views in some areas. All key stakeholders from the legal profession and third sector responded, however only one local authority submitted a response. The respondents can be categorised based on organisation type, with the numbers of respondents in each category detailed below.

	Number	Percentage ¹
Third Sector	11	18%
Individual	10	16.5%
Charity	2	3.5%
Legal Profession	28	46%
Local Authority	1	1.5%
NDPB	1	1.5%
Not-for-profit	3	5%
Public Body	5	8%

2.2. Responses

All questions were answered by at least one respondent. Responses were read and logged into a database, and all were screened to ensure that they were appropriate/valid. None were removed for analysis purposes. Although some responses to individual questions did not directly address what was being asked, all feedback was analysed and is presented under the appropriate sections below.

¹ Rounded to the nearest .5 for clarity. This is the case for all percentages within this document.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. To provide an element of weighting to this exercise, where appropriate, responses are reported with reference to numbers that include and do not include those respondents who were simply endorsing the response of a representative body.

For most of the questions, respondents were also asked to state the reasons for their views, or to explain their answers. The main reasons presented by respondents both for and against the proposals set out across the consultation were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support, and other related comments

Respondents to consultation document completed a Respondent Information Form (RIF) which allowed them to specify their publishing preferences. Respondents who choose to email their views and did not complete the RIF were contacted to ascertain their publishing preferences. Only extracts where the respondent indicated that they were content for their response to be published were referenced.

3. Key findings from the analysis of responses

3.1. General

Views were often split depending on whether the respondent was from the legal profession, third sector, etc. Questions on enhanced powers for the Scottish Legal Aid Board were answered almost solely by the profession.

This divergence in views is highlighted by showing the respondent figures with reference to the inclusion of those who were endorsing the views stated in the responses of the Edinburgh Bar Association and the Glasgow Bar Association

3.2 Part 1 of the consultation

There are areas of broad consensus with the main principals of reform well supported, however there are very mixed views on how to implement the change agenda.

The majority of respondents supported that the user should be at the centre of the legal aid system. Only two individual respondents did not support this. A further two were unsure.

The majority of respondents agreed that the current model of provision could be strengthened. Most felt that increased targeting of specific areas of law and geography would enhance flexibility and provision of services. However there was no clear consensus on how to achieve this. The third sector and law centres were supportive of targeted grant funding and contracts to achieve this. The legal profession considered increased payment levels to be key here.

Most respondents agreed that legal aid did not currently operate as a public service and would support a move towards this. They considered that this would increase accessibility and accountability, and as a public service there would be expectations

of delivery and outcomes from providers. There was concern that a move to being a public service could lead to rationing or have the unintended consequence of reducing the number of providers of legal aid.

3.3. Part 2 of the consultation

Overwhelmingly respondents supported not only retaining the current scope of legal aid but also widening it, specifically legal aid provision for group actions, tribunals and issues related to Human Rights.

The majority of respondents agreed that there was action which could be taken to support and enhance the work of SLAB including better training, more consistency in decision making, and enhanced information sharing between organisations.

Most respondents supported more flexibility in the system to respond to changes in legal procedure or an emerging need, and supported the ability of SLAB to use grants and exclusive contracts to target services. This view was not echoed by the legal profession.

The proposal to introduce a Memorandum of Understanding between legal aid providers and the Scottish Legal Aid Board polarised views. Law centres, clinics and third sector organisations were more supportive of this proposal, and have experience of receiving funding subject to certain agreements and standards requirements. The professional bodies are uniformly against this, voicing concern that the relationship would be one sided in favour of the Scottish Legal Aid Board, and that any compulsion for firms to take on work deemed to financially unsustainable could reduce the number of legal aid providers.

The majority of respondents supported a single eligibility assessment at the beginning of the process whilst retaining the ability for more complex calculations when necessary, and having a simplified system of contributions in civil matters for those who can afford to pay, as long as thresholds were set at an appropriate level and took into account individual circumstances. Fairness was key to all respondents.

A small majority of respondents favoured grants or contracts to facilitate exclusive funding arrangements. It was considered that this would assist with access for particular groups such as women affected by domestic abuse, people with disabilities, care experienced children, and those with mental health issues. Most respondents also agreed that this should be available across all legal aid types. The legal profession were opposed to this, particularly for criminal and children's legal aid.

A move to a High Trust Model received significant support.

4. Detailed Analysis

PART 1 – FOUNDATIONS FOR CHANGE

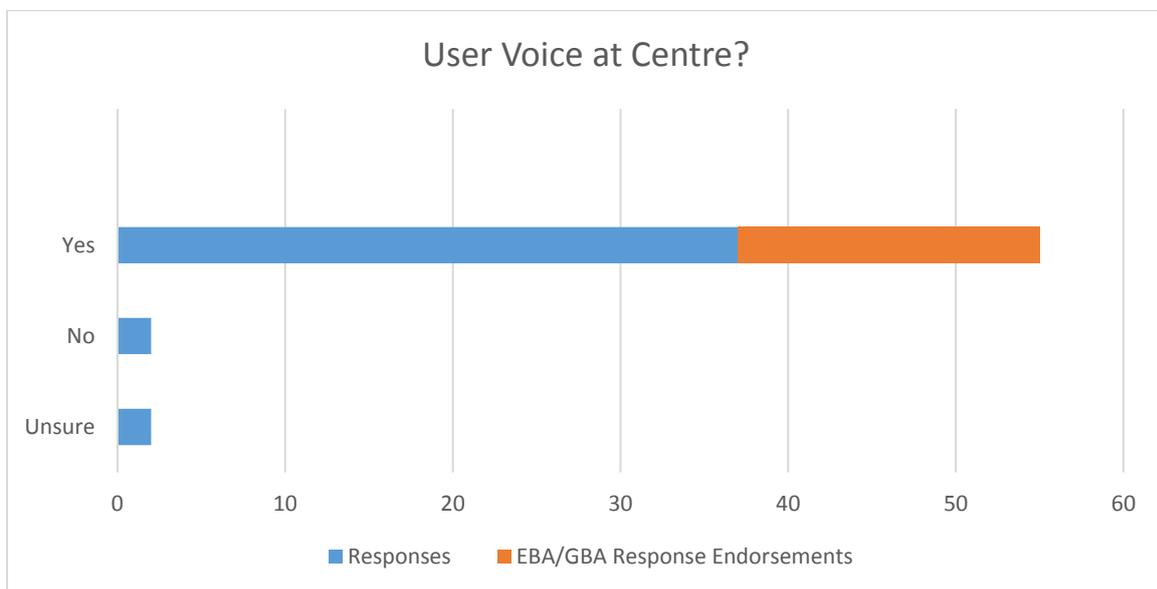
i) Legal aid has the user voice at its centre

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

Yes – 55 (93%)

No – 2 (3.5%)

Unsure – 2 (3.5%)



How desirable are each of the following ways of embedding the user voice and experience into the design and delivery of a legal aid service, on a scale of 1 – 5?

Capturing User Voice – direct engagement

32 responses

Scored 3 or over – 25 (78%)

Capturing User Voice – indirect (e.g. consumer panels)

32 responses

Scored 3 or over – 25 (78%)

Capturing User Voice – collaborative

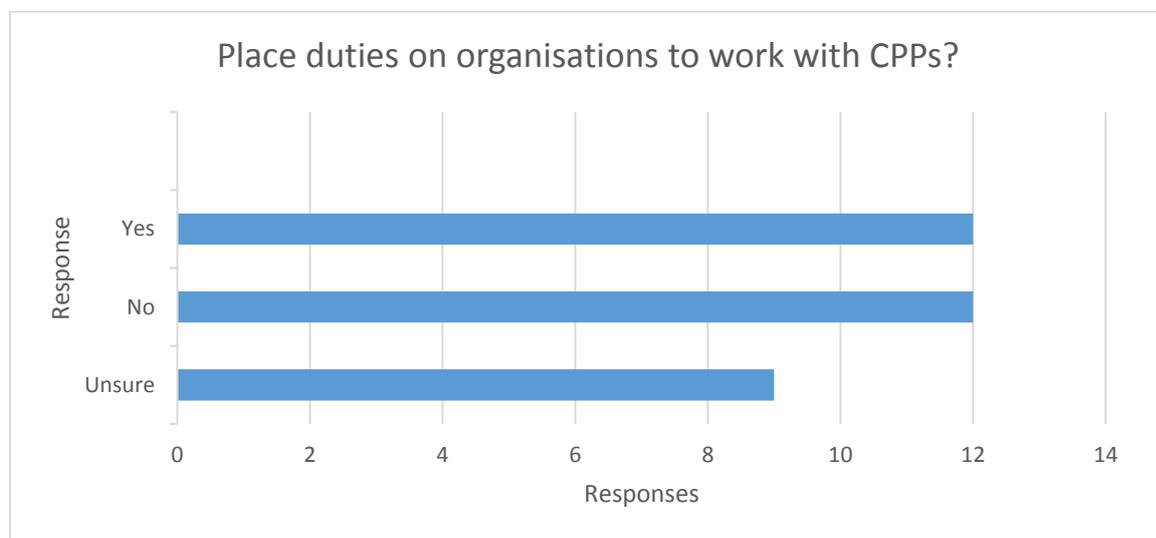
30 responses

Scored 3 or over – 26 (87%)

Most respondents considered that a mix of all three would be the most beneficial. Basic questionnaires or similar for direct engagement and building that in to the others.

Partnership working and Community Planning Partnerships (CPPs) help provide local context to user needs. Would you support placing duties on a prescribed list of public sector organisations, to work together in order to help CPPs achieve their goals?

No – 12 (36.5%)
Yes – 12 (36.5%)
Unsure – 9 (27%)



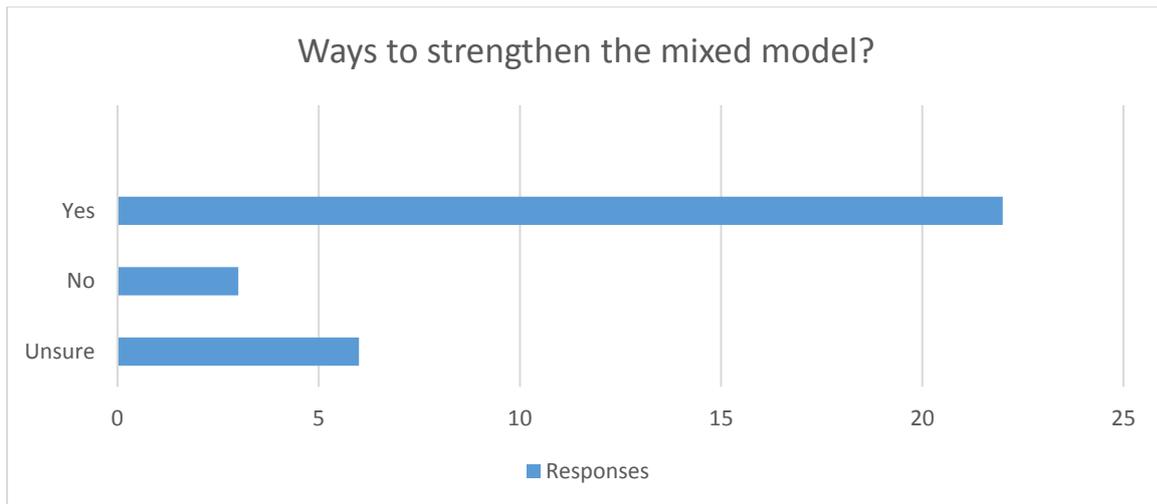
Very mixed views with “Yes” and “No” responses each receiving a 36.5% share of support with 27 % “Unsure”. One “No” response was, however, followed by a comment that it was an interesting initiative and they would be interested in a pilot.

Only one local authority submitted a response to the consultation; East Ayrshire Council noted that they already had Community Justice Ayrshire and the local CPP has already had a number of new duties placed on it. They query how this proposal would affect the role of both. Other respondents had concerns around conflicts of interest as the local authority may often find themselves against a legally aided individual.

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

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

Yes – 22 (71%)
No – 3 (9.5%)
Unsure – 6 (19.5%)



EBA, GBA, individual solicitors and LSS all consider additional funding to be the best way of strengthening the mixed model. Other respondents would like to see targeting of specific areas of law and geography and greater flexibility.

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?

A number of areas were expressly highlighted by respondents across these three related questions. In particular, disability; mental health; children’s legal aid; housing; employment; domestic abuse; debt/welfare; family; tribunals; fitness to practice hearings. Lack of funding for reasonable adjustments was perceived to create inequity for people with disabilities.

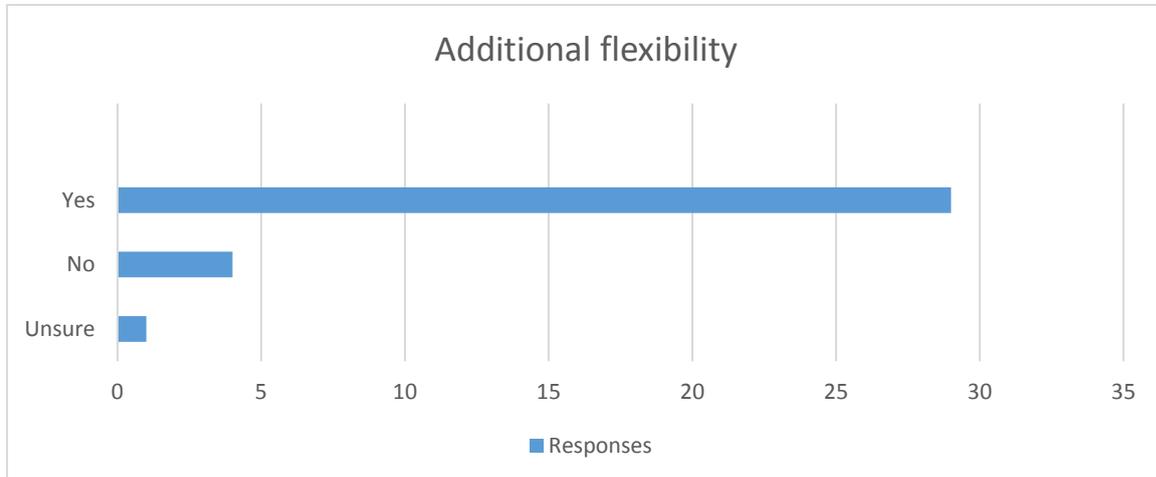
Arguments were made in favour of removal of parental means from financial eligibility assessments for child applicants and for moving to an automatic entitlement for children and the care experienced.

Some respondents considered that housing, debt, employment, domestic abuse, immigration and asylum were areas currently poorly served by private providers, with most of this work being undertaken by law centres and clinics through A&A, with Shelter, Citizens Advice Bureaux (CABx) also providing advice and support.

On mental health, respondents considered there to be poor coverage geographically and that providers were not sufficiently specialised where they do exist. Issues with mental health often linked to the issues above.

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

Yes – 29 (85%)
No – 4 (12%)
Unsure – 1 (3%)

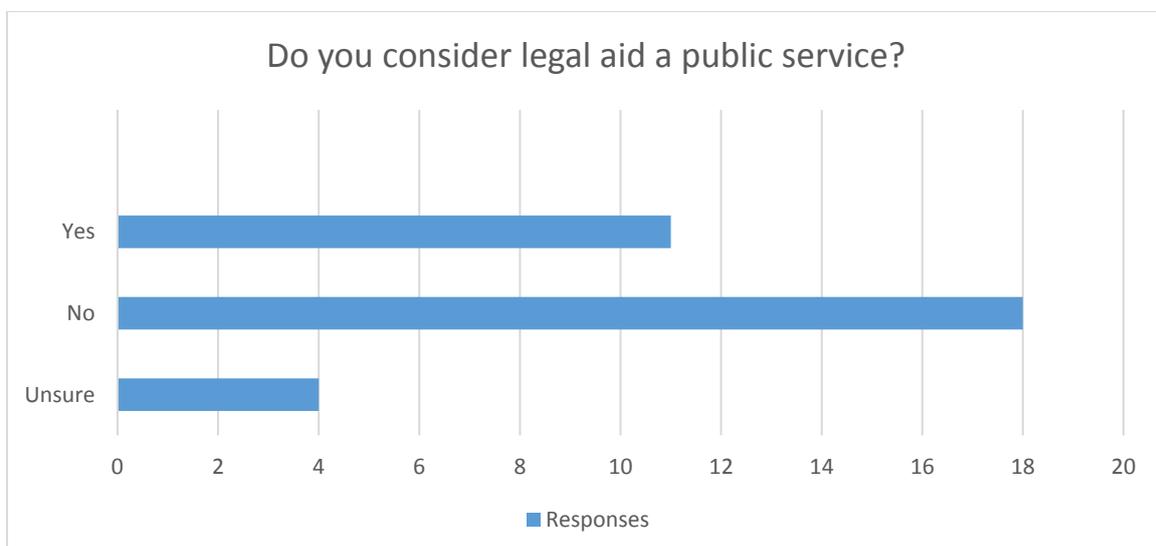


EBA did not support this therefore the 5 adoptees of that response would increase “No” up to 9, with those in support still outnumbering this tally by some way. LSS also stated that the current system provides a high degree of flexibility.

iii) Legal aid as a public service

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

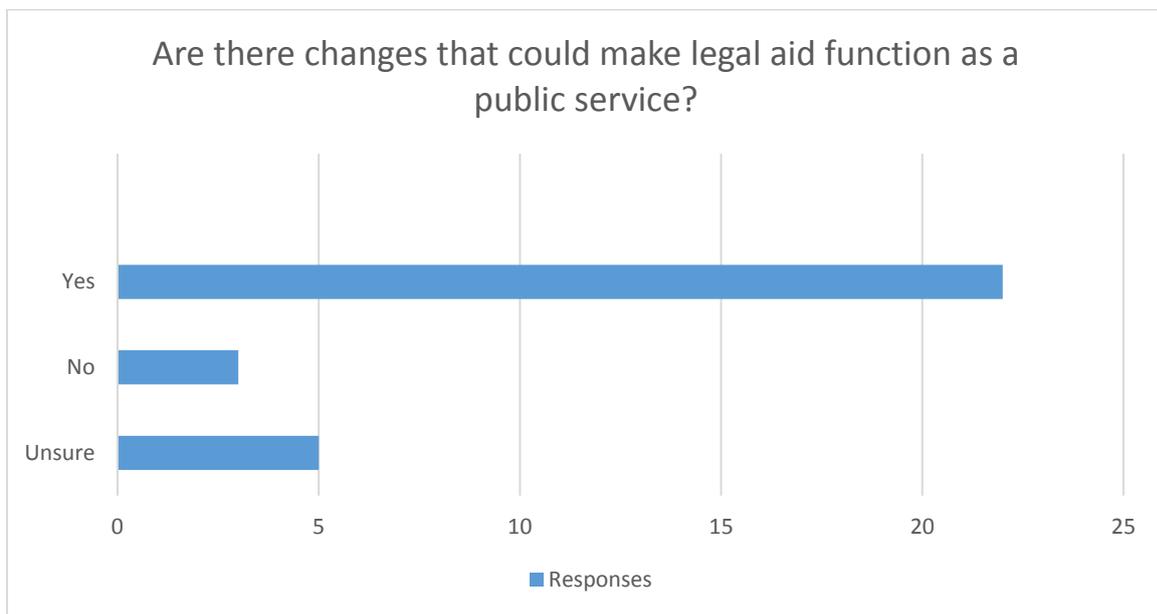
Yes – 11 (36.5%)
No – 18 (54.5%)
Unsure – 4 (9%)



Most respondents felt legal aid did not currently operate as a public service. Comparisons with the NHS were drawn, with parallels that public funds paid private providers but for legal aid there were too many exclusions and access was not universal. More than one respondent likened it to more of a welfare payment, based on means.

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

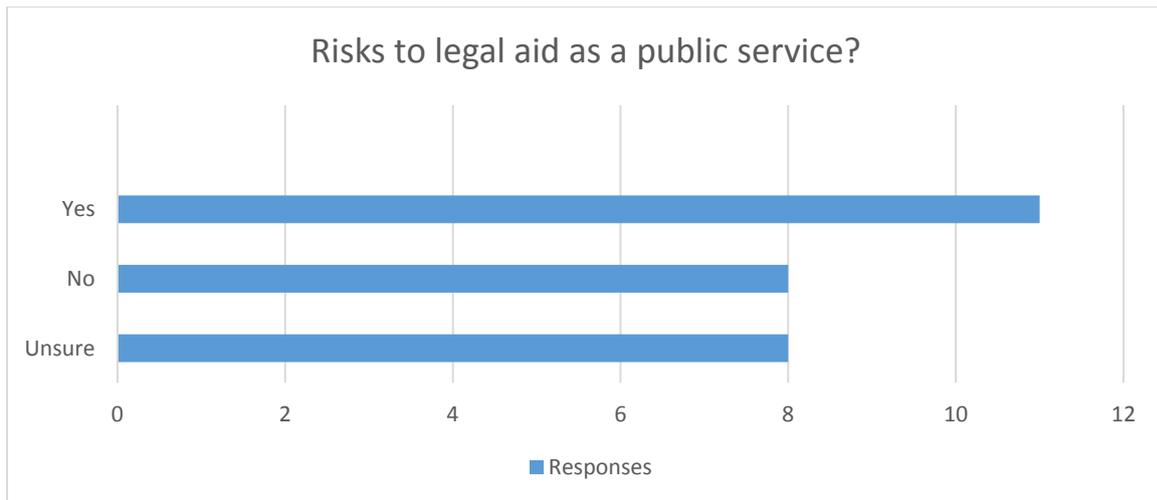
Yes – 22 (73%)
No – 3 (10%)
Unsure – 5 (17%)



73% of respondents indicated support that changes would make legal aid function as a public service. Suggestions for changes included the service to be accessible to all, easier to navigate, have more accountability, and alignment of delivery and outcomes.

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

Yes – 11 (41%)
No – 8 (29.5%)
Unsure – 8 (29.5%)



Concerns included greater scrutiny and expectations impacting negatively on the number of private providers willing to undertake legal aid work, and “Best value” leading to rationing. The need for legal aid provision to be independent from Government was flagged, under explanation that some actions will seek to challenge the Government.

Part 2 – THE CHANGE AGENDA

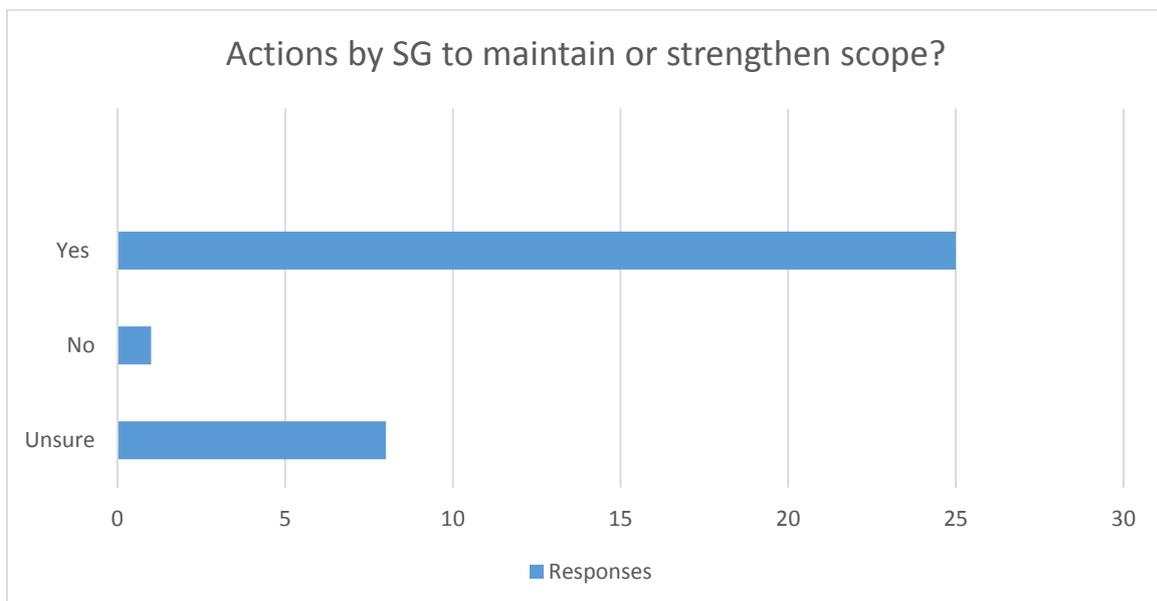
i) Scope and oversight

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

Yes – 25 (73.5%)

No – 1 (3%)

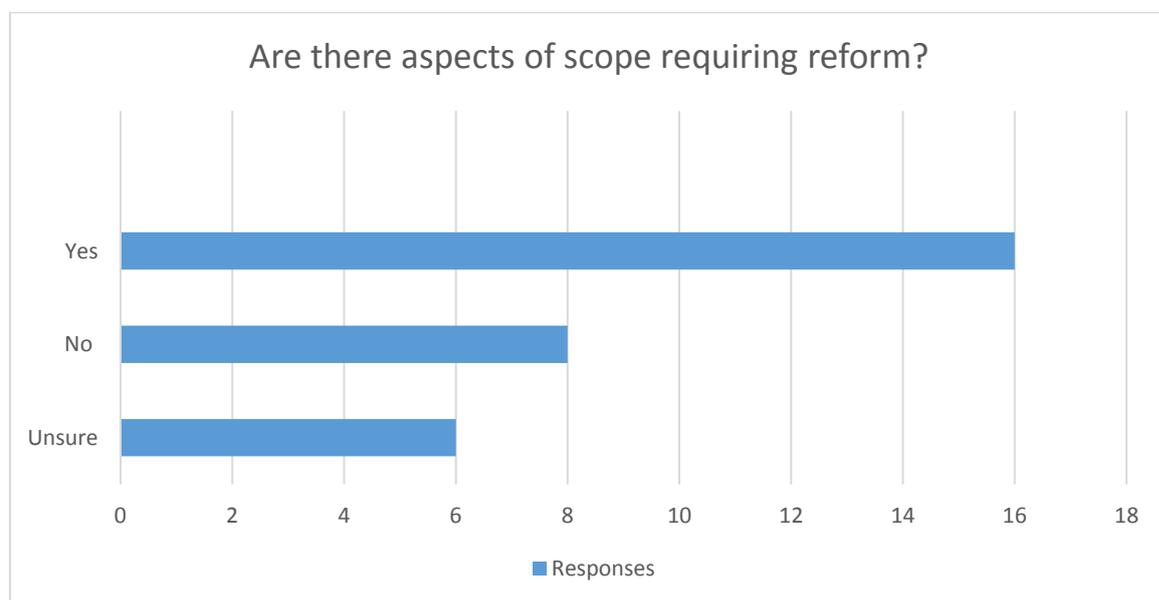
Unsure – 8 (23.5%)



Respondents supported that the current scope to cover any issue that was a matter of Scots law be maintained; that funding of legal aid should be a priority for the Scottish Government, and it should continue to be demand led and uncapped. There were also calls for fee reforms and additional support provided for rural practitioners, as well as expansion of current scope to include class actions and to broaden eligibility to allow access to more people.

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

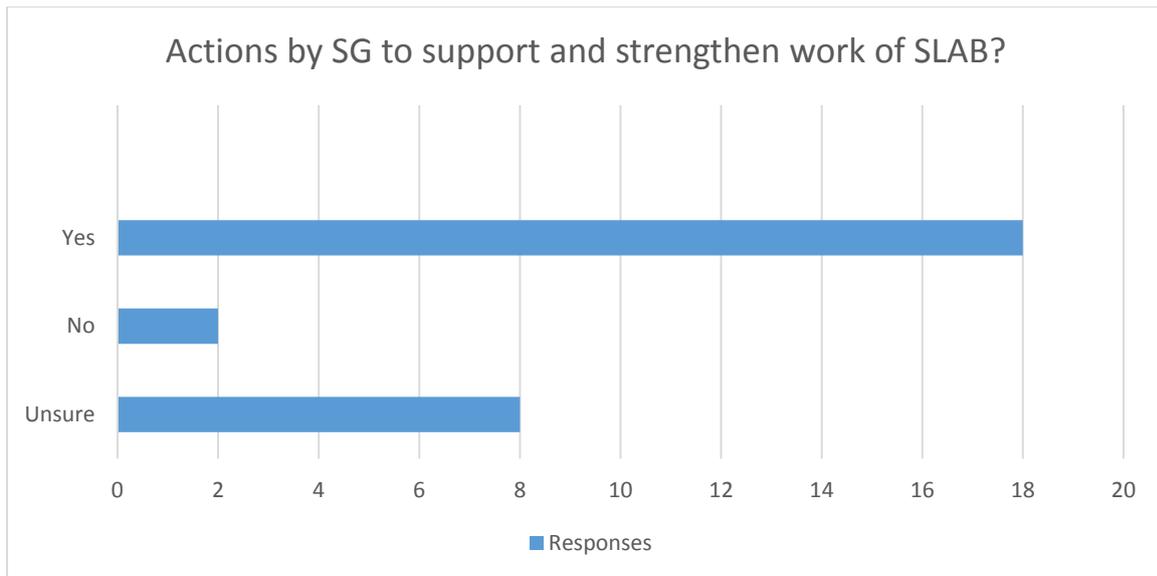
Yes – 16 (53%)
No – 8 (27%)
Unsure – 6 (20%)



53% of respondents were in favour of reform to scope, including expansion to cover group actions (specific reference was made to environmental issues) to cover more tribunal work (such as employment and social security), and for breaches of human rights act. In addition, there were calls to widen the scope of financial eligibility for children injured at birth, and the application of meaningful discretion in disregarding parental finances. Free legal representation for children was advocated by some.

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

Yes – 18 (64.5%)
No – 2 (7%)
Unsure – 8 (28.5%)

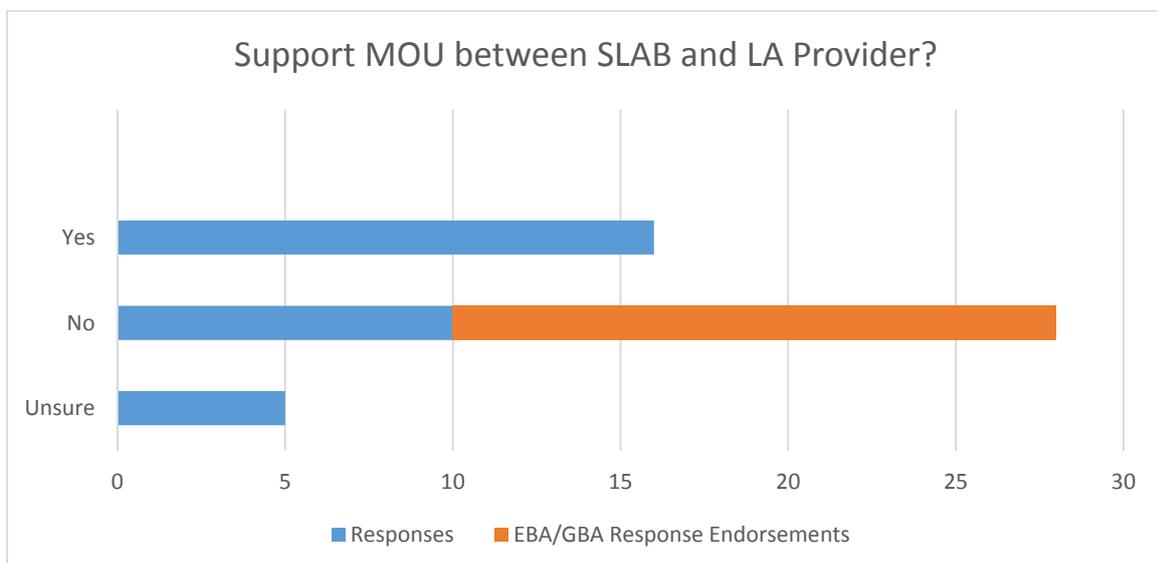


Suggestions included: protocols for decision making and review and better training to enhance consistency; guidance should be equality and human rights impact assessed; move to fully electronic applications, with no signatures required; and allow for information sharing between organisations for eligibility verification.

ii) Improving access and targeted interventions

A more structured relationship between SLAB and legal aid providers could be facilitated by way of a formalised agreement. Do you support a Memorandum of Understanding between solicitor firms and the Scottish Legal Aid Board being a prerequisite for doing legal aided work?

Yes – 16 (33%)
 No – 28 (57%)
 Unsure – 5 (10%)



Law Society of Scotland (LSS), EBA, and GBA did not support this proposal. Law centres and other not for profit organisations (which tend to have experience of grant agreements) tended to support the proposal.

Those who support this welcomed the potential for greater clarity in the relationship, in service delivery requirements and expectations on both sides. This could help to achieve a consistency of provision which is considered lacking in some areas of civil law currently.

Those opposed were concerned that the relationship would be one sided in favour of SLAB, that firms would be compelled to take on work, in particular work that was not well remunerated, and that it could in turn reduce the number of legal aid providers.

One respondent was opposed to the idea as they considered embedding standards in statute would have more force.

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

Respondents' suggestions included CPD training in areas of relevant expertise and also human rights; professional accreditation and assurances; terms around financial transparency and scrutiny; enhanced payments; ability to secure government funding for training and measures to address the mental and physical welfare for providers (particularly those working with vulnerable client groups or trauma experienced clients).

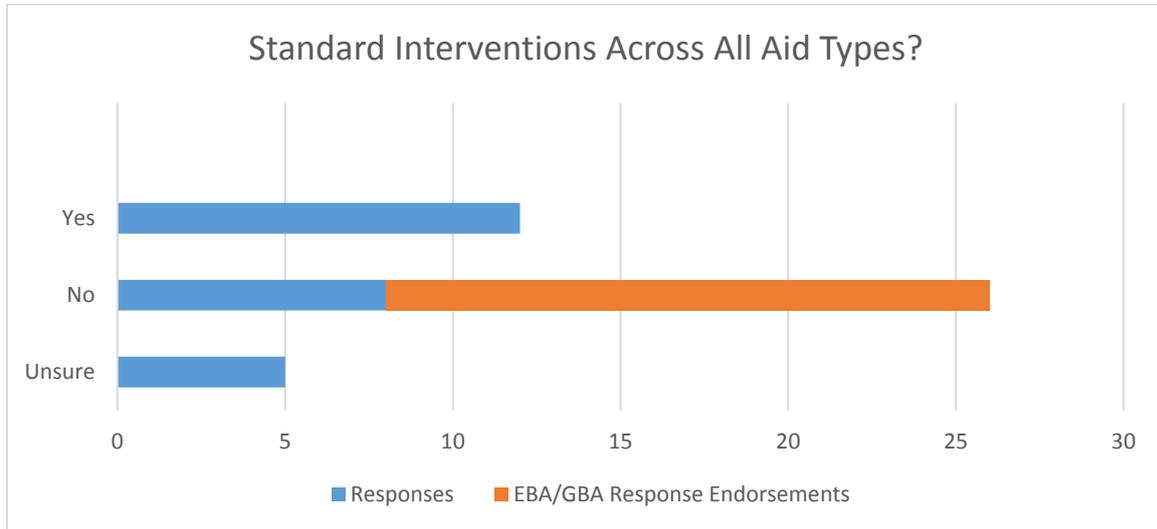
It was also suggested there should be clear expectations of service levels, with commitments to take on cases, serve a geographical area, accept referrals from other organisations, minimum training on areas of law being practiced, commitment to equality and to making adjustments where required. Maximum hours to be worked could also be established.

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?

There was concern that a commitment to certain number of cases could be financially unsustainable for some firms. This may cause providers to withdraw from work met by legal aid. The experience in England and Wales was raised as an example where conditions did not work well. There would need to be flexibility in-built to allow changes to be made quickly, if too prescriptive it would not work.

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

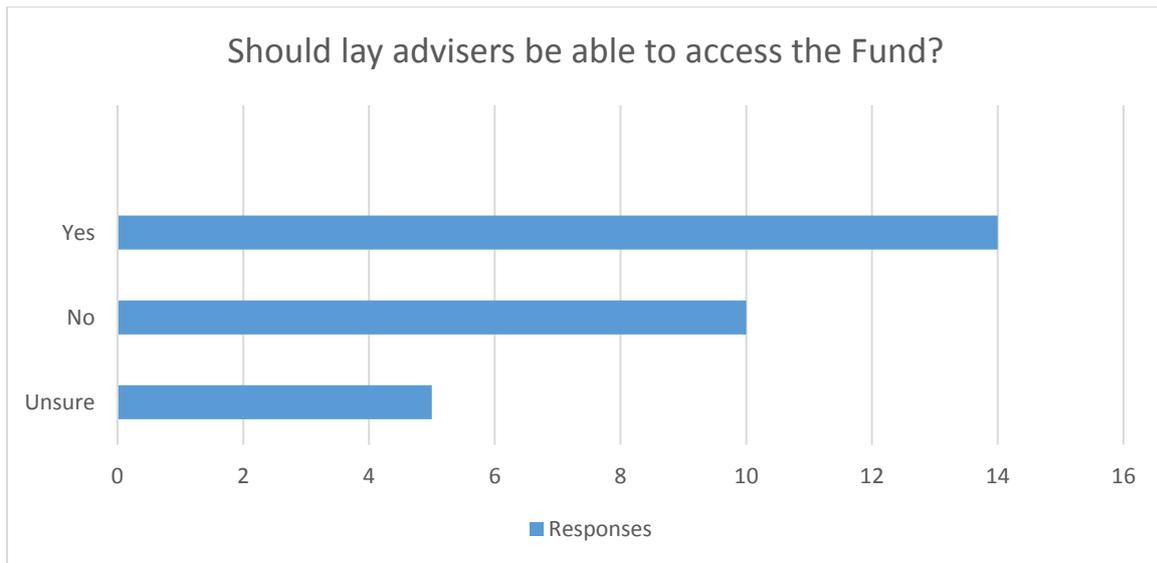
Yes – 12 (28%)
No – 26 (60.5%)
Unsure – 5 (11.5%)



EBA, GBA, and LSS did not support this proposal, on the basis either that SLAB held sufficient powers currently or that SLAB should not have any new powers. The Scottish Association of Law Centres (SALC) and Legal Services Agency (LSA) support the proposal. Those in favour supported powers where there was a proven need and to increase flexibility in the system.

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

Yes – 14 (48%)
No – 10 (35%)
Unsure – 5 (17%)



Although 48% of respondents indicated support, this question produced a very mixed response. There were concerns raised about non-legally qualified advisers providing legal advice. Of those respondents who supported the idea, some still felt that this should only be done under the close supervision of a solicitor, and some commented that any fee would have to be at a reduced level as it was not legal advice.

All respondents considered that lay advisers had a place within the system, but that it deemed risky to move to this provision without ensuring the expertise was there.

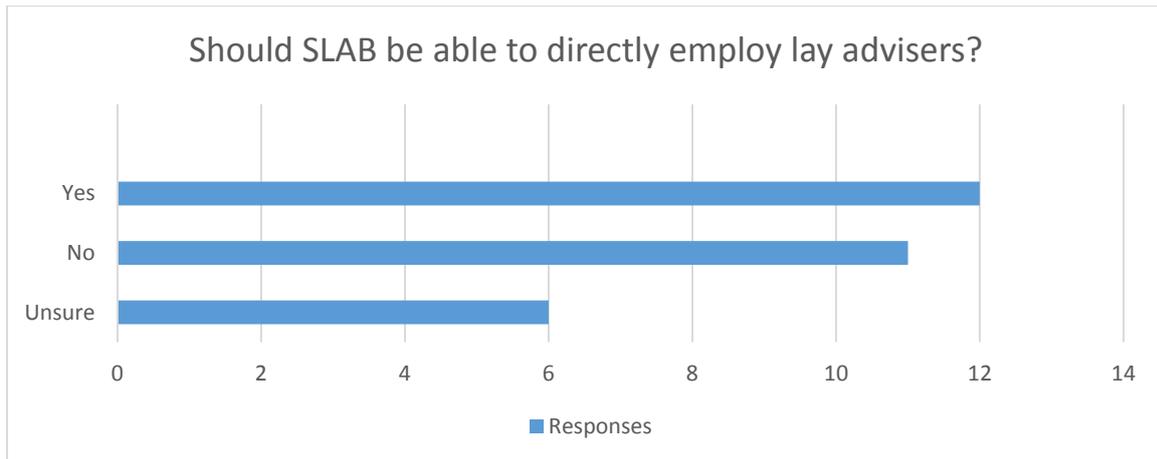
There was support that advisers should be regulated and accredited and that, if implemented, paralegals in legal firms should also be able to access funding. Citizens Advice Scotland (CAS) was not in favour, as claiming legal aid is against their policy, but did support grant funding.

What are your views on solicitors providing publicly funded legal assistance being located within third sector organisations that have service users with civil legal issues e.g domestic violence, minority groups or disabled groups?

This question gained support from organisations that already had experience of this situation, namely Shelter, CAS and law centres. Shelter suggested that the Civil Legal Assistance Office (CLAO) be outsourced to third sector organisations to deliver to specific locations. There was a reasonable level of support from other respondents. Inclusion Scotland was interested in this proposal as a way to make legal aid more accessible for people with disabilities through their organisation and others like it.

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?

Yes – 12 (42%)
No – 11 (38%)
Unsure – 6 (20%)

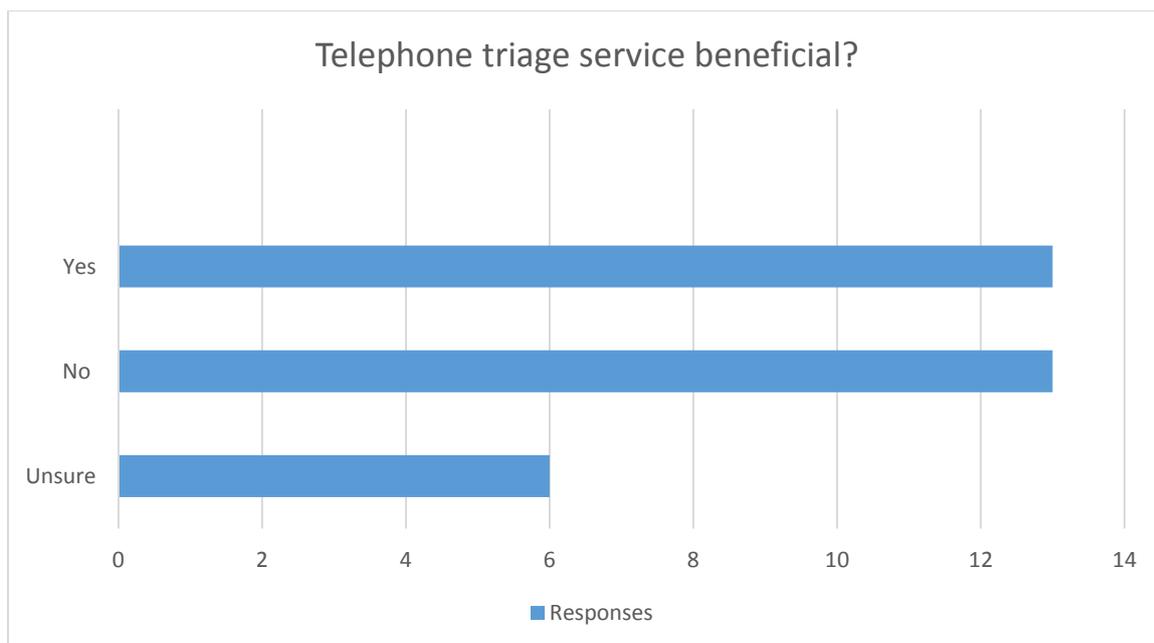


There was mixed support. Scottish Women’s Aid (SWA), SALC, GBA, LSA, Legal Spark, EBA, Shelter were all opposed. CAS were unsure and had concerns about SLAB playing a role of adviser while also quality assuring others. LSS also raised concerns about lay advisers providing legal advice or acting as gatekeepers to the Legal Aid Fund. There was concern that it would divert funding from existing services for little benefit.

Clan Childlaw did not support children being directed to such an advice line. One respondent supported the idea but appeared to indicate that CAB would be better placed for this role. Those who saw merit in the idea, considered that better provision was required and thought it could provide equity of access to advice.

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

Yes – 13 (40.5%)
No – 13 (40.5%)
Unsure – 6 (19%)



GBA, Shelter, EBA, Legal Spark, Clan Childlaw, Circles Network, and Equality and Human Rights Commission Scotland (EHRC) did not support this proposal. Concerns were raised about: accessibility, cost, lack of expertise of advisers (particularly in civil law), lack of access for hearing impaired, and the balance of cost/benefit. Some respondents were concerned that problems may be unable to be assessed properly over the phone as documents often need to be considered.

Those who were supportive considered that a properly staffed, free at the point of access, advice line (legal not lay) could help resolve issues that did not require solicitor involvement. Proponents saw this a benefit as part of a multi-channel system – but not the only service. There would have to be sufficient referral channels for this to work.

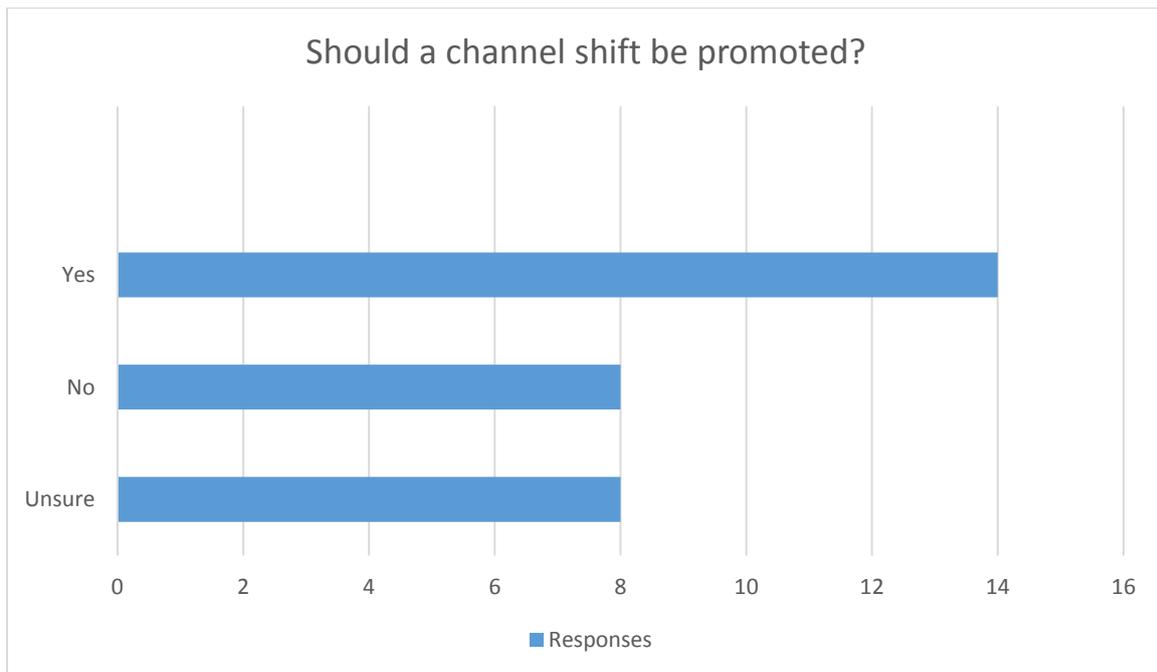
If such a telephone triage service were implemented, what criteria should be used to identify the most appropriate organisation to deliver this service?

There were a variety of suggestions including;

- public tendering process
- national expertise
- very high standard of training and QA
- geographical coverage
- number of qualified staff
- prior experience of operating a telephone advice line
- this should not be delivered by SLAB
- have knowledge of Corporate Parenting and the care experienced

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?

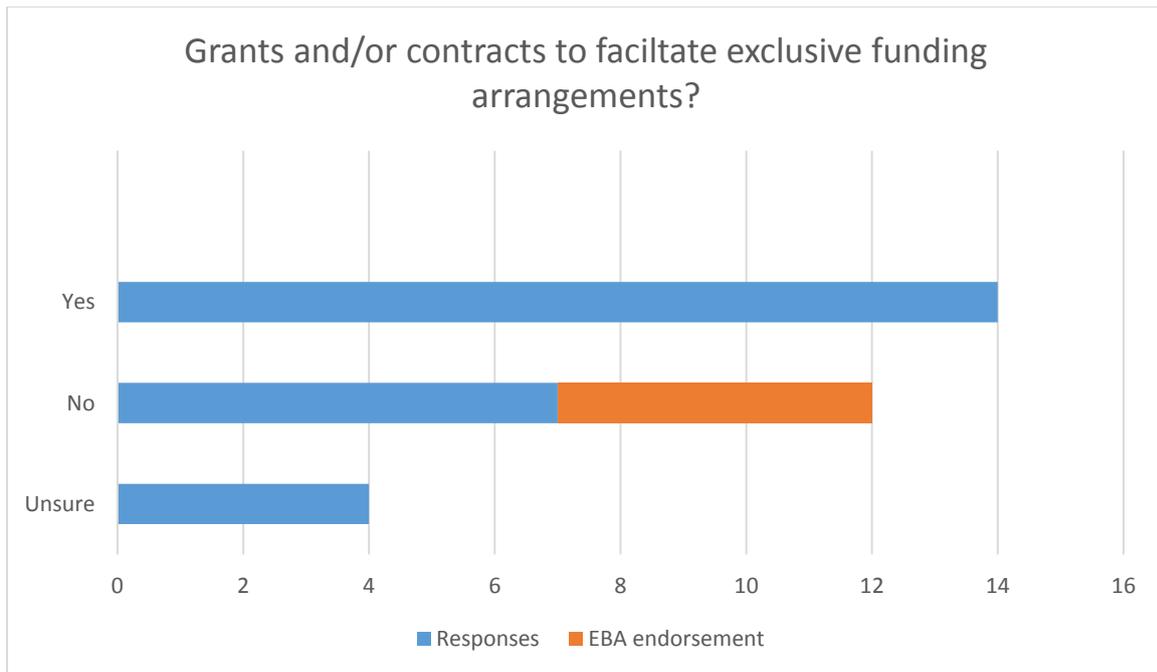
Yes – 14 (47%)
No – 8 (26.5%)
Unsure – 8 (26.5%)



There was a general consensus that nothing should replace face to face advice, rather that an enhancement of all forms of communication could potentially increase access. Face to face should remain an option for all, not just the vulnerable. Some respondents raised that it could be difficult to securely share documentary information without face to face meetings, and others felt a basic online service could be very effective at signposting or providing early advice. It could be difficult to assess vulnerability online or via a telephone call. CAS felt it was more important to focus on channel choice rather than channel change, and for there to be a delivery of “an integrated multichannel advice offer, putting the person at the front and centre to get advice when they need it, how they want it, and in a format that is relevant for them.”

Planned intervention could mean exclusive funding using grants for specific advice or geographical areas. Should grants and/or contracts facilitate exclusive funding arrangements to target a specific identified need?

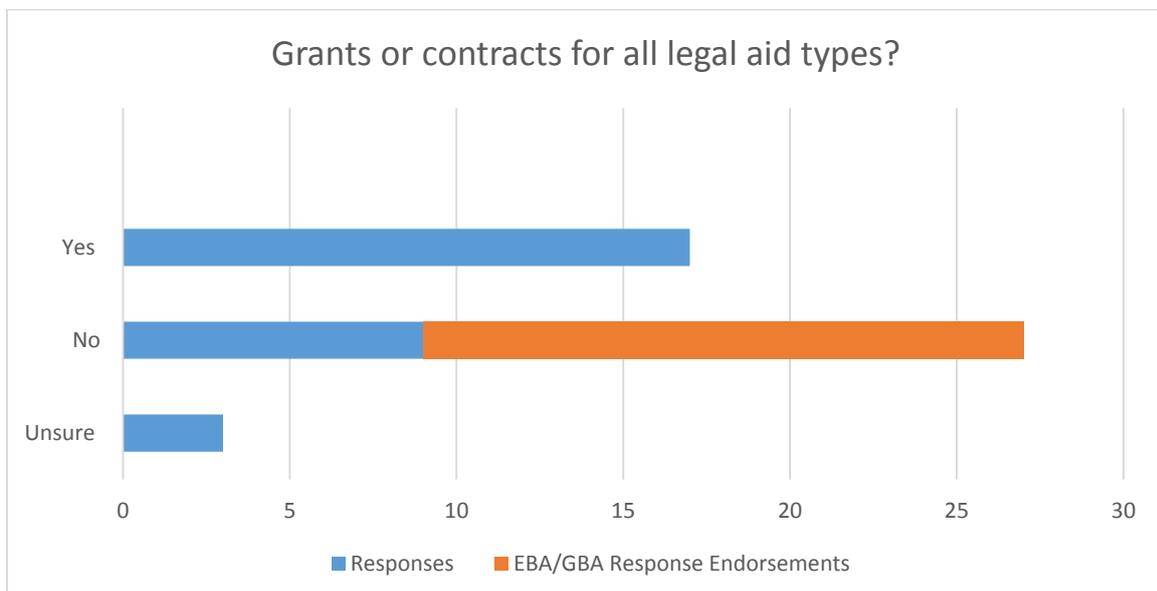
Yes – 14 (47%)
No – 12 (40%)
Unsure – 4 (13%)



This was supported by 47% of respondents; those in favour believed it would assist with particular groups such as women who have been effected by domestic abuse, people with disabilities, care experienced children, and mental health. This should be based on national expertise and geographic coverage. The GBA stated that increased fees and eligibility was key. LSS did not wish this to replace the standard judicare approach to legal aid. EBA, Legal Spark and some individual solicitors did not support this idea but expressed interest in fee increases.

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

Yes – 17 (36%)
 No – 27 (57.5%)
 Unsure – 3 (6.5%)



There was a clear split between the legal profession and those representing its interests, who did not support this (with particular reference to criminal and children’s legal aid) and Law centres, charities and SLAB who agreed that a standard range of intervention powers would be beneficial.

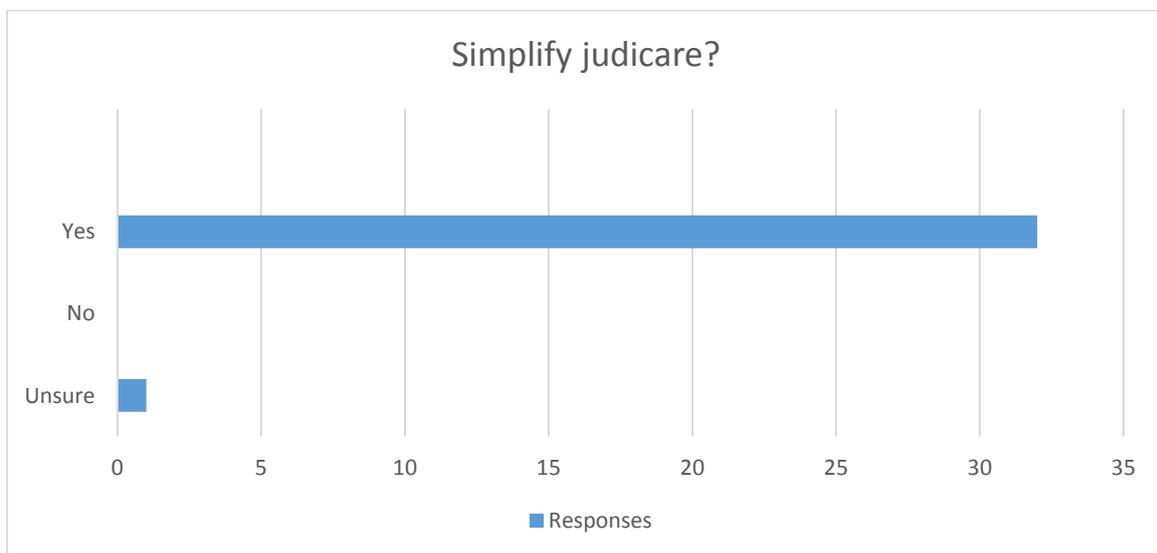
iii) Simplicity and Fairness

Do you agree that the judicare system should be simplified?

Yes – 32 (97%)

No – 0

Unsure – 1 (3%)



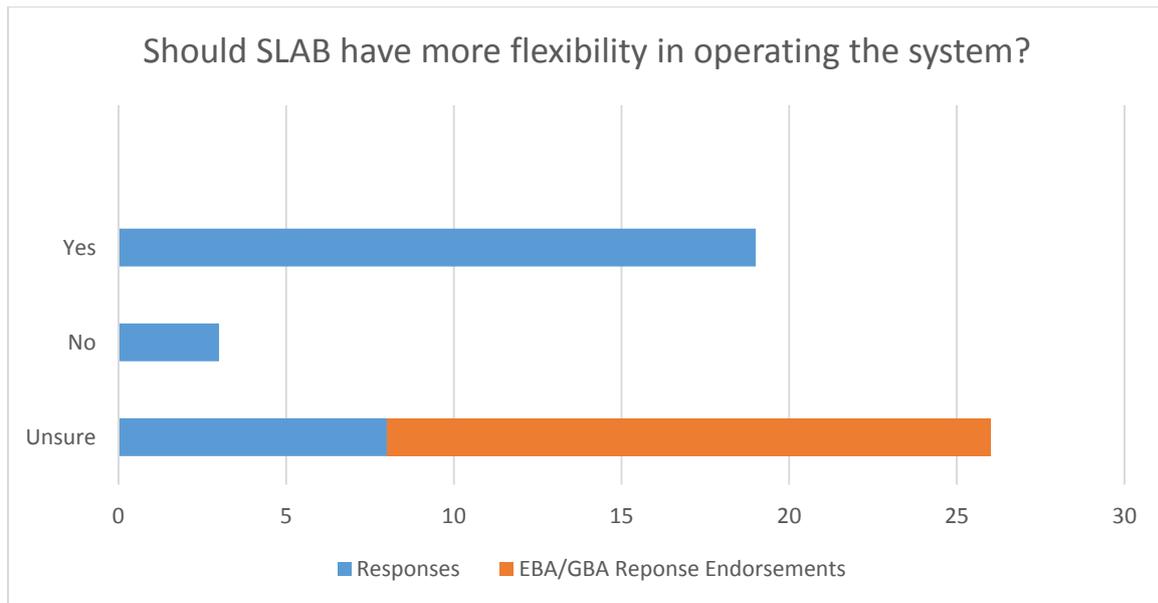
There was overwhelming support for this proposal, with very basic issues such as application processes, means test, eligibility and single grant all identified as areas which could be readily simplified. There was a suggestion that there should be automatic eligibility for criminal legal aid.

Should SLAB have more flexibility in operating the system?

Yes – 19 (40%)

No – 3 (6%)

Unsure – 26 (54%)



Analysis would suggest that relationship between SLAB and the legal profession, which can at times be fraught, is skewing the result here, whereas many other respondents were more open to giving SLAB extended powers. This helps to explain why 54% of respondents answered “Unsure”. The EBA and GBA narratives suggest that these organisations would not support any devolution of power to SLAB, but responded that they are “unsure” about the proposal. There is a concern about oversight, trust, and accountability of SLAB and that too much flexibility would have a detrimental effect on consistency and effect business planning.

Those in favour of more flexibility refer specifically to eligibility, targeting of services and response to emerging need, response to changes in legal procedures without relying on regulations for minor technical fixes.

Flexibility and fairness can trade off against one another. With this in mind: In which areas do you think it is most important to maintain consistency?

Respondents mentioned:

- Family law
- Mental health
- Distribution of funds
- Quality and competence
- The whole system – constant changes make business planning, staff retention and recruitment difficult
- Criminal law

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

Respondents mentioned:

- Employment
- Human rights
- Insurance
- Complex situations
- Finance (it is understood this refers to flexibility of eligibility)
- Disability law

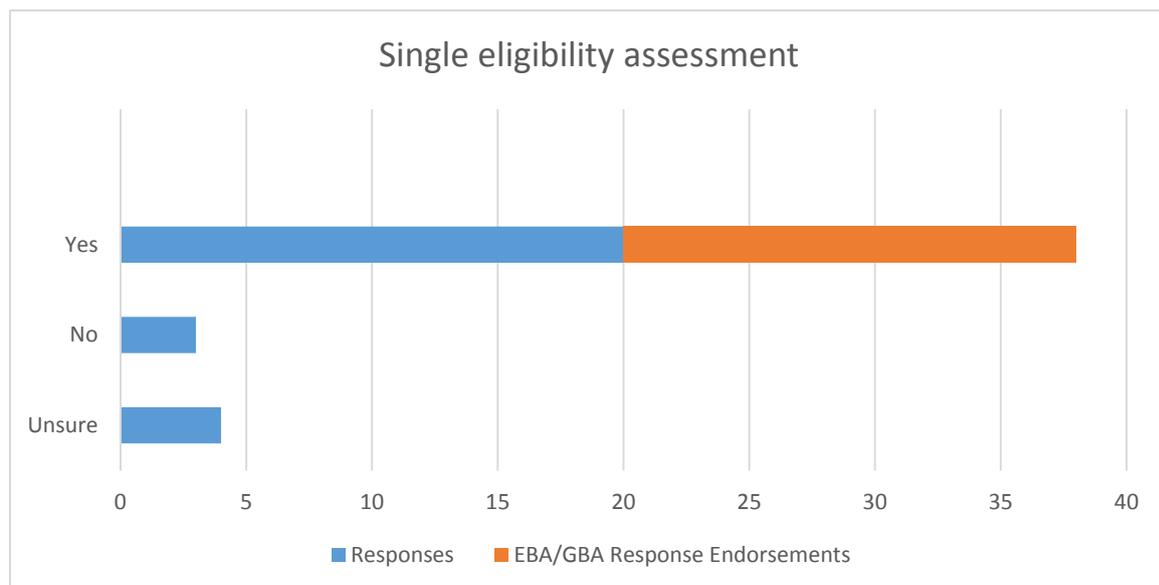
Two respondents specifically stated that fairness is more important than flexibility.

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

Yes – 38 (84%)

No – 3 (7%)

Unsure – 4 (9%)



This appears to be an overwhelmingly positive response to this proposal, with 84% of respondents supporting this; however, many of the “yes” come with caveats. While many were supportive of streamlining the process particularly when advice is needed quickly (e.g. domestic abuse, homelessness) a number still felt that more detailed means testing should be retained if required at later stages. One respondent stated that it should be a very detailed, all-encompassing single assessment which is rather contrary to the purpose of the proposal.

Any changes to the means or merits following this grant would also require to be reported and changes made to that assessment as necessary. There were a couple of respondents who considered that children should be exempt from any means testing and should be assessed as eligible immediately. It was also commented that

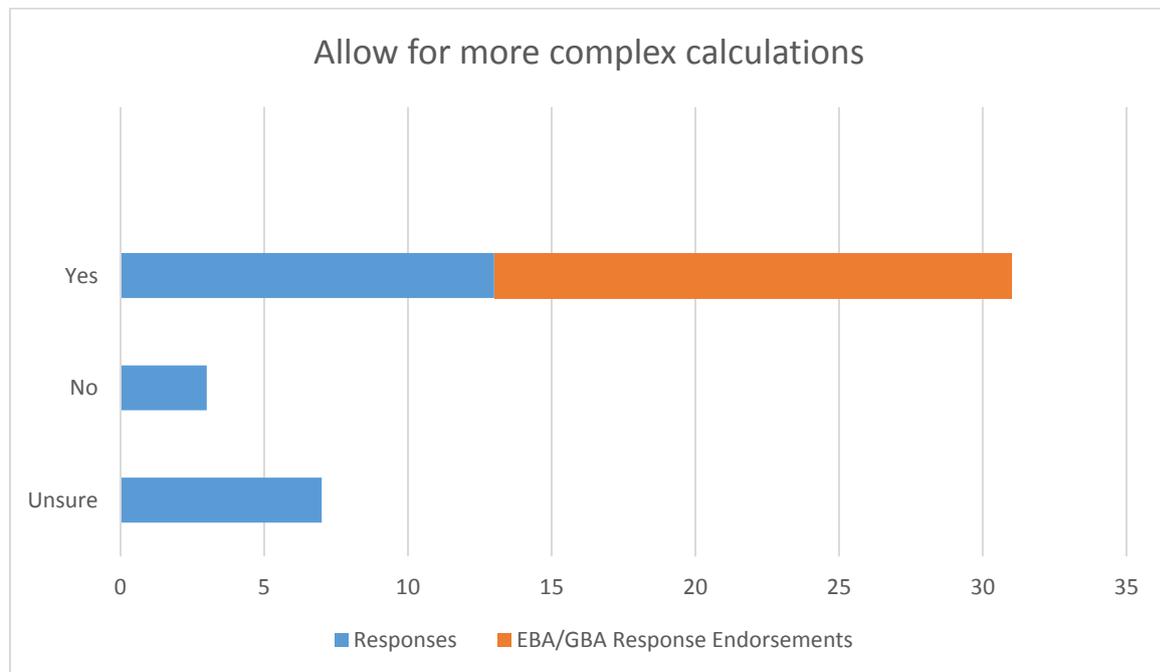
the financial test would also have to be straightforward enough for solicitors to easily apply without being overly burdensome with standard allowances for outgoings somewhat taking in to account individual circumstances.

Those who did not support the proposal did not put forth many arguments as to why.

The Association of Personal Injury Lawyers (APIL) felt the current system worked well. Their area of law is largely self-funding when awards are taken into account which may inform this view.

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

Yes – 31 (76%)
No – 3 (7%)
Unsure – 7 (17%)

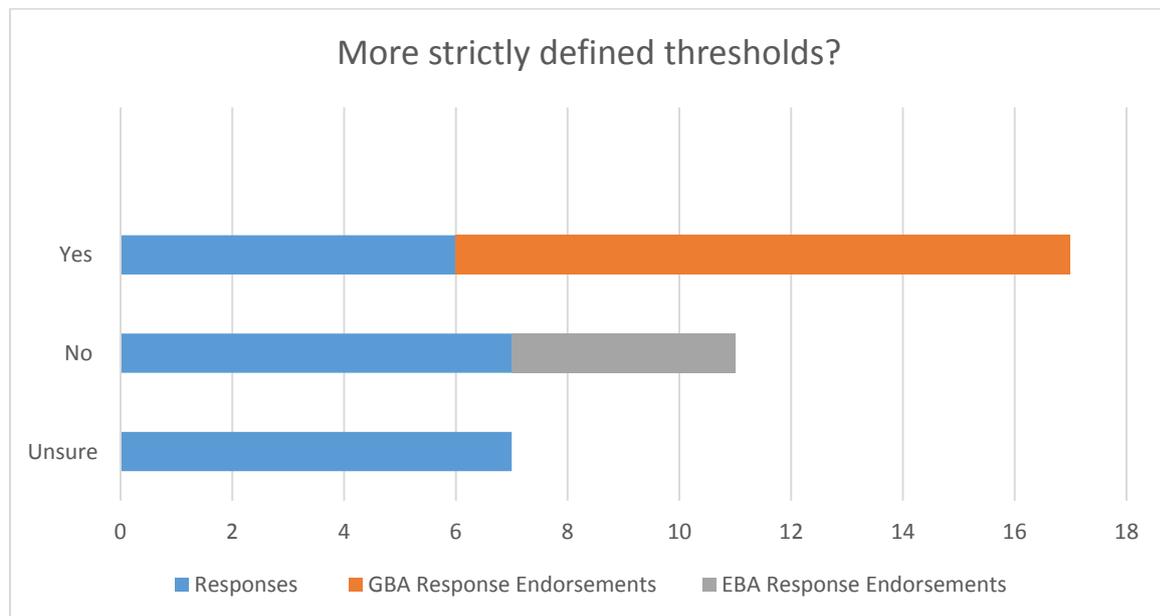


The importance of fairness was a key part of the responses to this. Access to justice should not be reserved to only the wealthy or the very poor. There was support for continuing to take individual circumstances into account when required. Widening the eligibility thresholds would mean more people were eligible at the proposed early single assessment and those on the cusp could request more detailed assessment through SLAB.

Should there be more strictly defined financial thresholds for eligibility?

Yes – 17 (49%)
No – 11 (31%)
Unsure – 7 (20%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



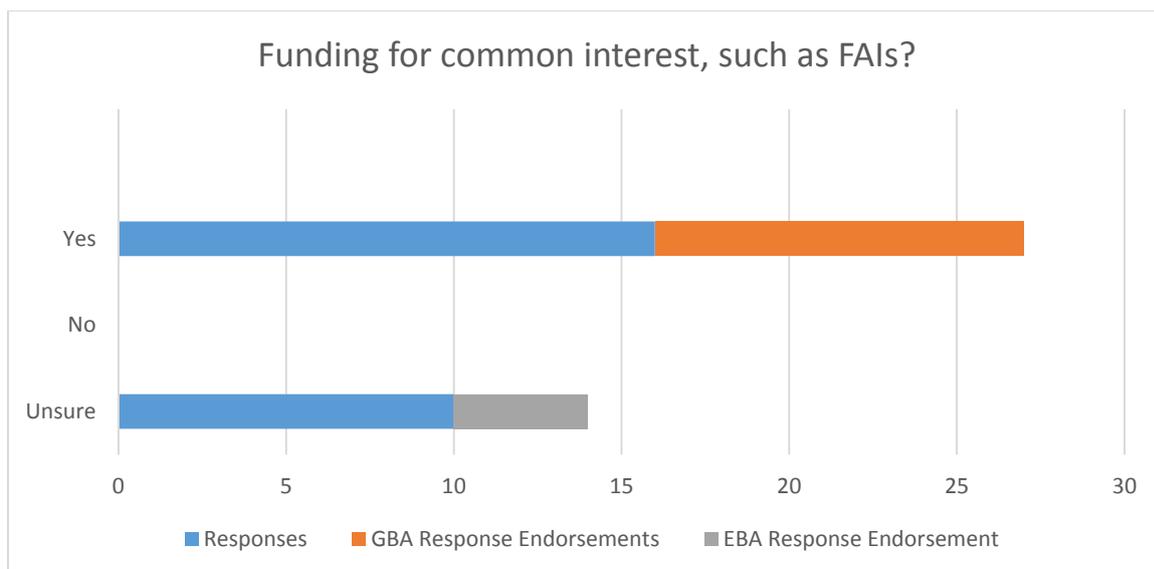
The tension between consistency and fairness is apparent in the responses. Stricter thresholds without taking individual circumstances into account could exclude people who otherwise would have been eligible. Clear allowances for standard household expenses would assist within the current system and if stricter thresholds were introduced.

Some respondents were of the view that reform of the system should lead to more inclusivity not less – but many concerned that the opposite would occur. The use of the word “strictly” in this question may have prompted people to think that the proposal was for a lower threshold which was not what was meant here. It was proposing that the system could be made less complex by removing the individuality of assessment.

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

Yes - 27 (66%)
No - 0
Unsure - 14 (34%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



Although no respondents were completely opposed to this proposal, again there were caveats to support. By way of an example, the GBA supported the proposal but recognised the interests of justice would have to apply, weighing the public interest against the individual interest. They suggest that funding for certain aspects might be appropriate e.g. cross examination of expert witnesses.

Some felt that group actions or action by an NGO on behalf of a vulnerable individual/community should be funded by legal aid and should include charities taking action in the public interest.

Others made the point that simply because a group have a common interest it does not necessarily follow that they share the same view on proceedings. There is some consensus that there is a need for a clearer framework for group funding and that a way should be found to allow for it.

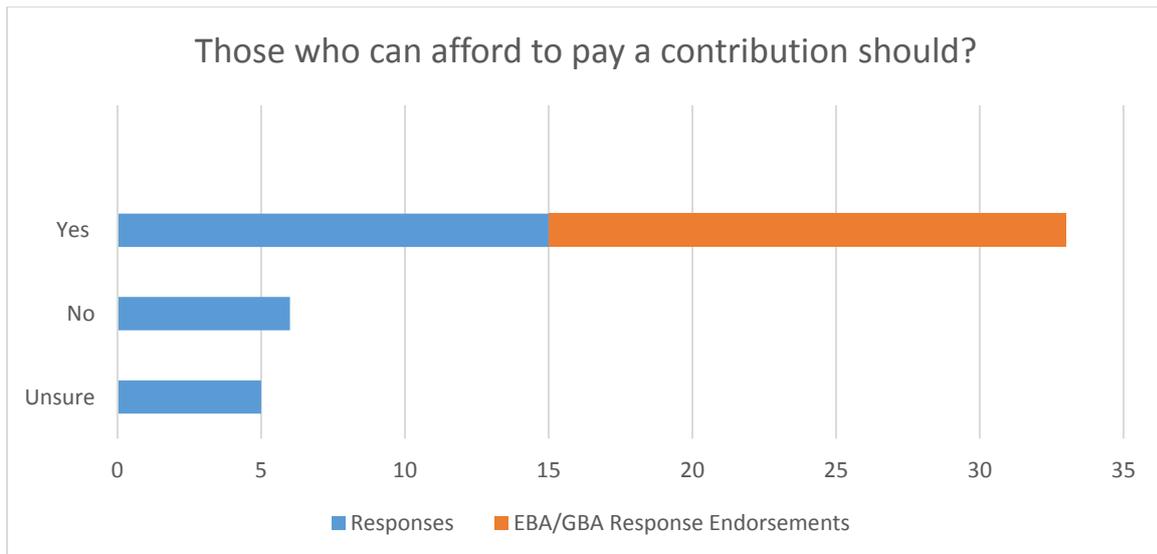
One respondent suggested that this required separate consultation.

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

Yes – 33 (75%)

No – 6 (13.5%)

Unsure – 5 (11.5%)

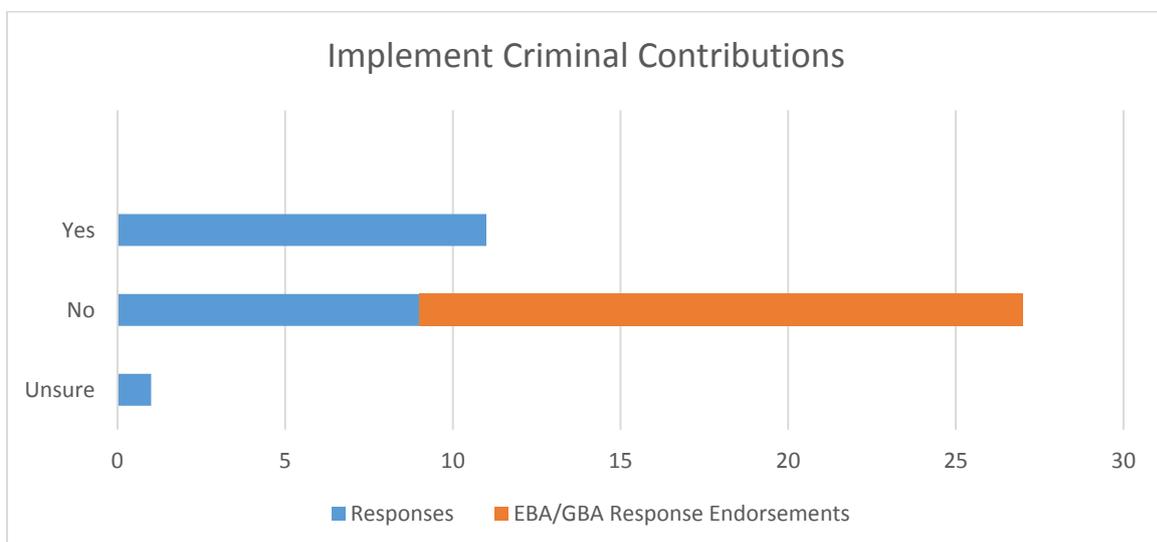


It was generally supported that eligibility thresholds be set at an appropriate level to ensure an ability to pay a contribution. Some respondents favoured children being exempt from contributions and means testing. More than one respondent raised the matter of disability and the costs associated with reasonable adjustments not being met. It was also considered that disability related benefits should not be included as income in means testing.

LSS, EBA, and GBA all responded that this should apply in civil only not criminal. There was support from some respondents that contributions should be collected by SLAB.

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

Yes – 11 (28%)
 No – 27 (69%)
 Unsure – 1 (3%)



Overall 69% of respondents did not support this, with no support by private providers to this proposal. The GBA posited that there is an equality of arms argument to be made with the Crown and the police not limited to cost implications or limitations.

LSS state that means testing would not take in to account reduction in income as a result of the prosecution e.g. being on remand/under curfew while awaiting trial may limit an accused persons' earning potential.

It was also noted in the review there is a difficulty for private providers to collect contributions from those they are representing. If payment was outstanding it would lead to difficulties in further representation and even lead to withdrawal from acting thus delaying court proceedings and adding to churn in the system. The costs of that delay may outweigh the benefit of the contribution.

A further point made was that accused are forbidden from representing themselves in certain cases. They have no other option but to engage a solicitor whether they want to or not.

Some respondents were of the view that, if introduced, SLAB should collect these contributions. The issue of a person found not guilty having their contribution returned was also raised.

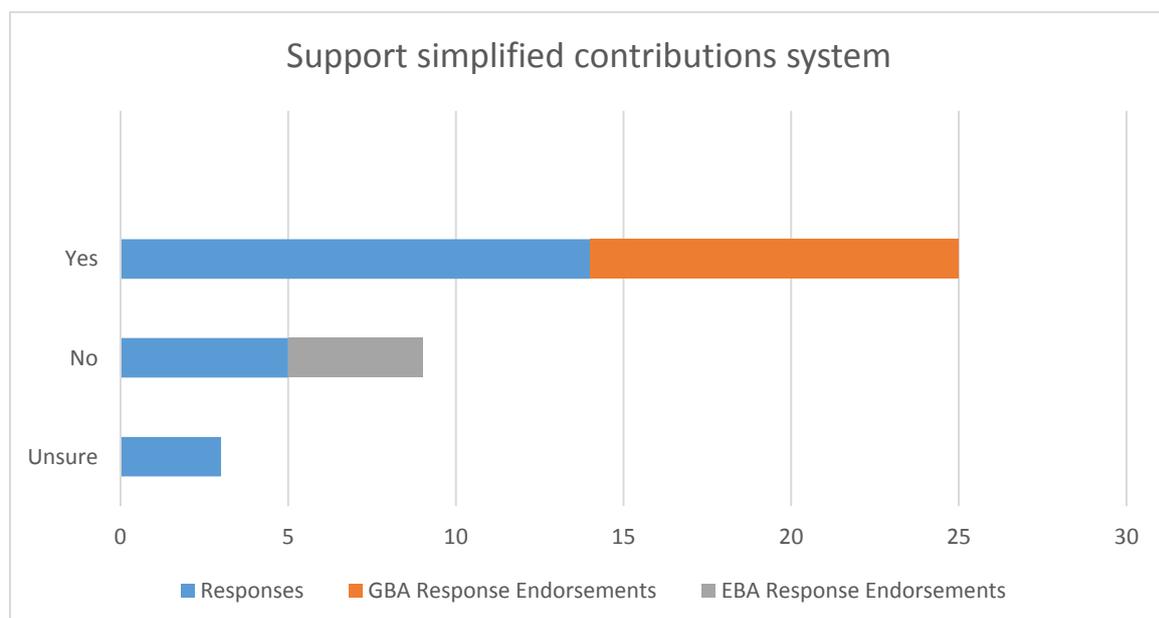
The existing contributions regime is complex but highly personalised. Would you support a simplified, more transparent and more accessible contributions system, even if this might risk some of benefits of this personalisation?

Yes – 25 (68%)

No – 9 (24%)

Unsure – 3 (8%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.

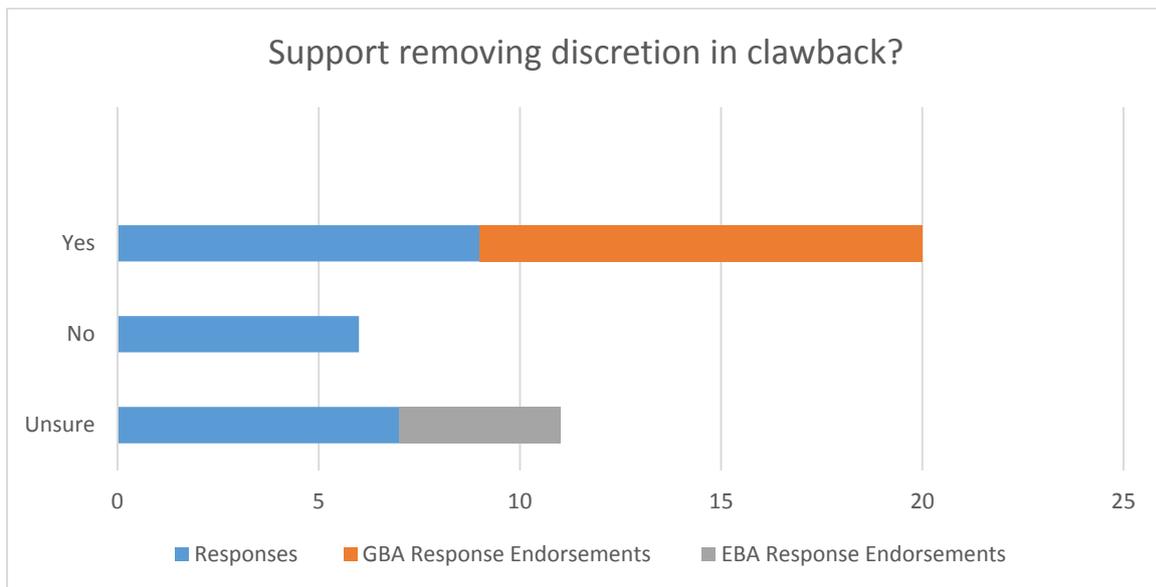


The majority of those in favour of this proposal still wished to retain personalisation for exceptional cases. Fairness was considered to be important. One of the respondents who did not support the proposal did not support any system of contributions. Another criminal law practitioner believed that automatic legal aid would remove the issue of contributions altogether.

There are inconsistencies in the operation of clawback. Would you support addressing this by removing discretion to create a more transparent system, even if this might risk some benefits of the flexibility this discretion allows?

Yes – 20 (54%)
No – 6 (16%)
Unsure – 11 (30%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.

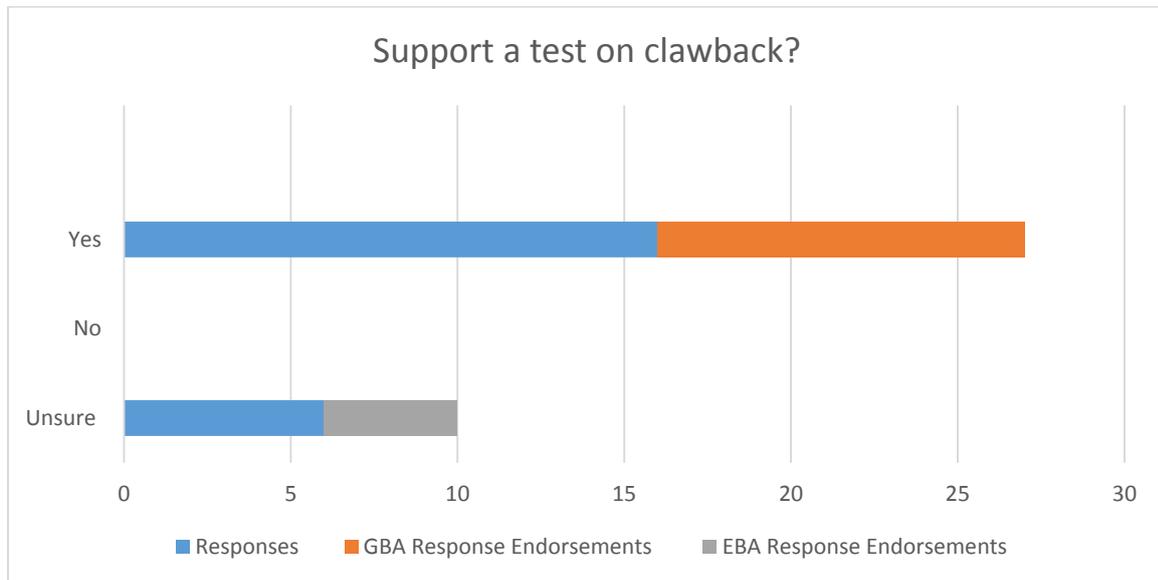


A very mixed response but there was support for a simpler system which could be more easily understood. Those who did not support the proposal were primarily concerned about unfairness in the application of clawback. One respondent who was “unsure” about the proposal stated that clawback should be abolished entirely as a waste of time and money. Another respondent considered that hardship discretion in clawback be extended to all cases.

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

Yes – 27 (73%)
No – 0
Unsure – 10 (27%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.

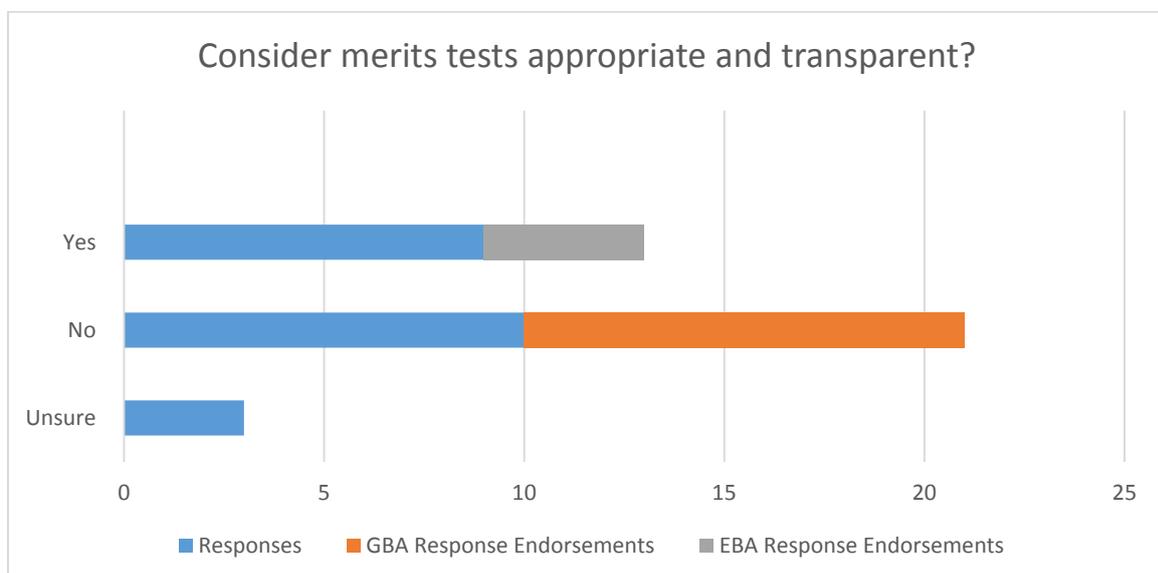


Respondents commented on a need for scrutiny, accountability and trust in the system, and that the current clawback system is causing hardship to some due to the way it is applied. Those already in debt may result in further debt as a result of a successful action.

Do you consider the merits tests appropriate and transparent?

Yes – 13 (35%)
No – 21 (57%)
Unsure – 3 (8%)

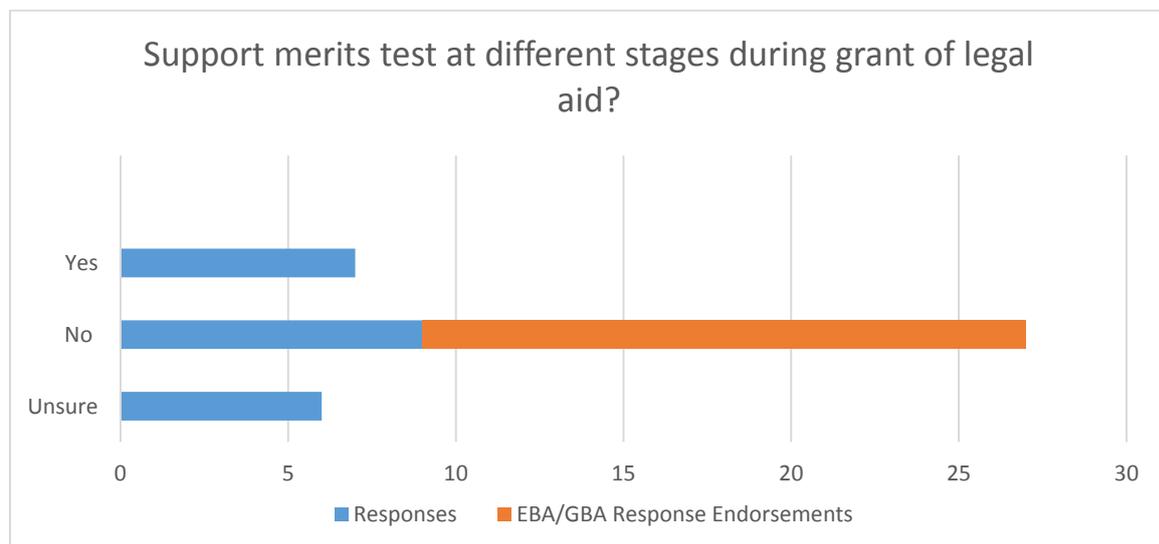
This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



There is no real central theme underlying the responses to this question. Some respondents considered the tests appropriate, others felt it should be consistent but flexible, there were those who feel it should be simple and quick to determine, whereas others were of the view the current tests do not take enough information into account. It would suggest that the current tests are not appropriate and transparent but there is conflict in how they could be improved.

Merits tests could be applied at defined stages during the lifetime of a grant of legal aid. For example before an appearance is made in civil court proceedings, or on receipt of summary complaint and any following appeal. In principle, do you support the application of a merits test at defined stages during the lifetime of a grant of legal aid?

Yes – 7 (17%)
No – 27 (68%)
Unsure – 6 (15%)



68% of respondents did not support this proposal, many felt it would present unnecessary extra bureaucracy for very little benefit. Requirements to notify SLAB to material changes of circumstance would be more appropriate.

Those in favour felt that this would ensure SLAB were working with up to date information.

One organisation marked “no” however the narrative following that suggested that they were actually in favour of this, on the basis that they felt it could be supportive of women experiencing domestic abuse and could more closely link civil and criminal proceedings.

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?

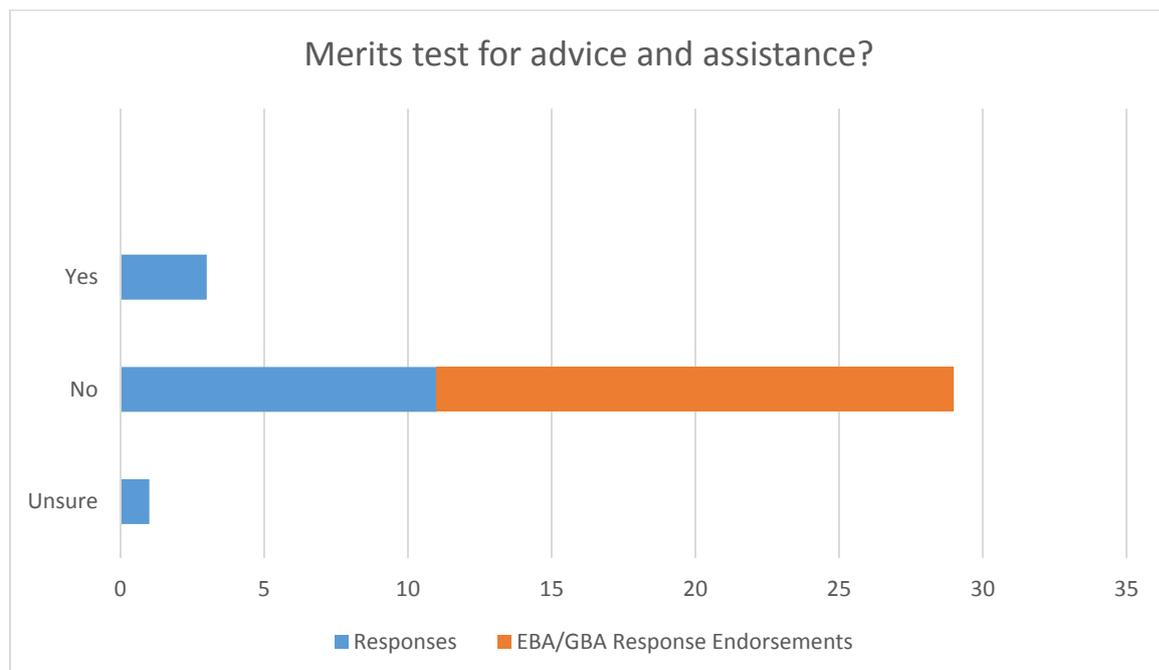
There is across the board support for this proposal. In a well regulated profession moving to a high trust model could be achievable. Allowing solicitors the ability to grant legal aid without SLAB sanction would reduce the application process, facilitate quicker decisions for those in urgent need (domestic abuse, homelessness etc.), and in turn reduce administration costs of the Legal Aid Fund. It is recognised that some financial checks would still be required in a high trust model.

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

Generally responses from the legal profession suggest that there are sufficient controls in place currently, and no suggestions were made about what might be necessary if the system changed or moved to a high trust model. Other suggestions were for yearly evaluations for providers or for protections to be built in to any MoU.

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

Yes – 3 (9%)
No – 29 (88%)
Unsure – 1 (3%)



Most respondents considered this a complication to the existing scheme, which would cause delays for little benefit and create barriers at the first access point. SWA were particularly concerned about how this would affect women and children seeking protection from abuse.

It was suggested that a test after the initial granting of A&A, if looking for a further increase, might be a better approach.

iv) Enhanced Statutory Powers and Best Value

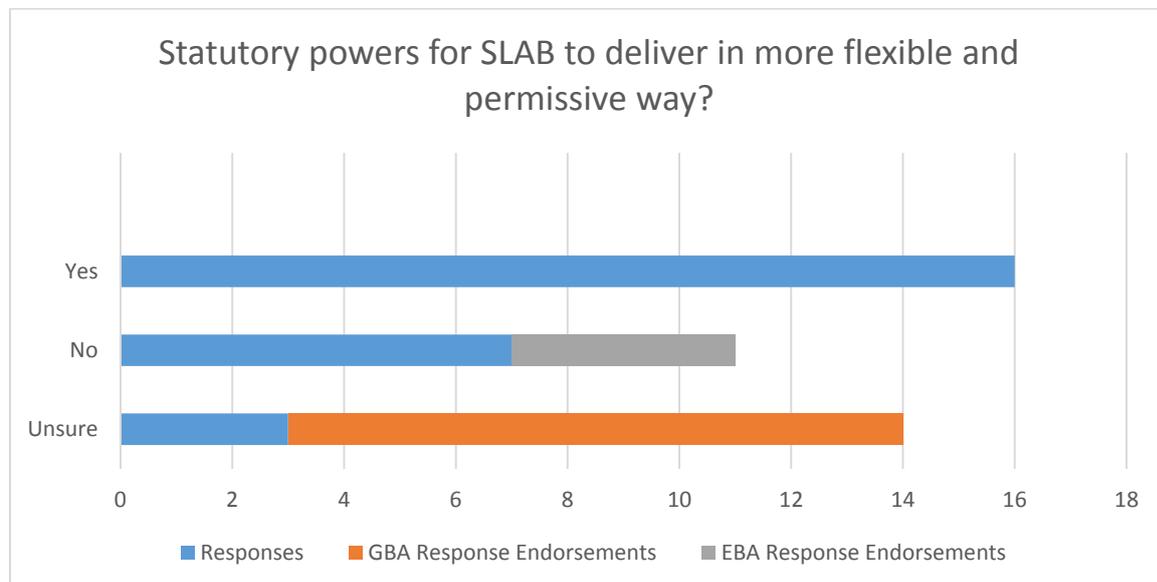
SLAB could have statutory powers to operate more strategically. Do you support there being statutory processes that allow SLAB to facilitate legal aid delivery in a more flexible and permissive way?

Yes – 16 (39%)

No – 11 (27%)

Unsure – 14 (34%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



39 % of respondents answered “Yes” with support for a variety of reasons, including increased flexibility that allow geographical or legal deficits to be addressed quickly, and allowing SLAB to address changes in court procedure more readily so that new work is funded.

Respondents who were unsure (34%) could see benefits but required reassurance that SLAB would be properly accountable for any actions it took.

The legal profession do not speak with a single voice on this proposal. The EBA response strongly opposed more power being given to SLAB. The GBA however

may be able to support this if flexibility relates to an ability to increase hourly rates or block fees. The LSS believes SLAB have sufficient powers already.

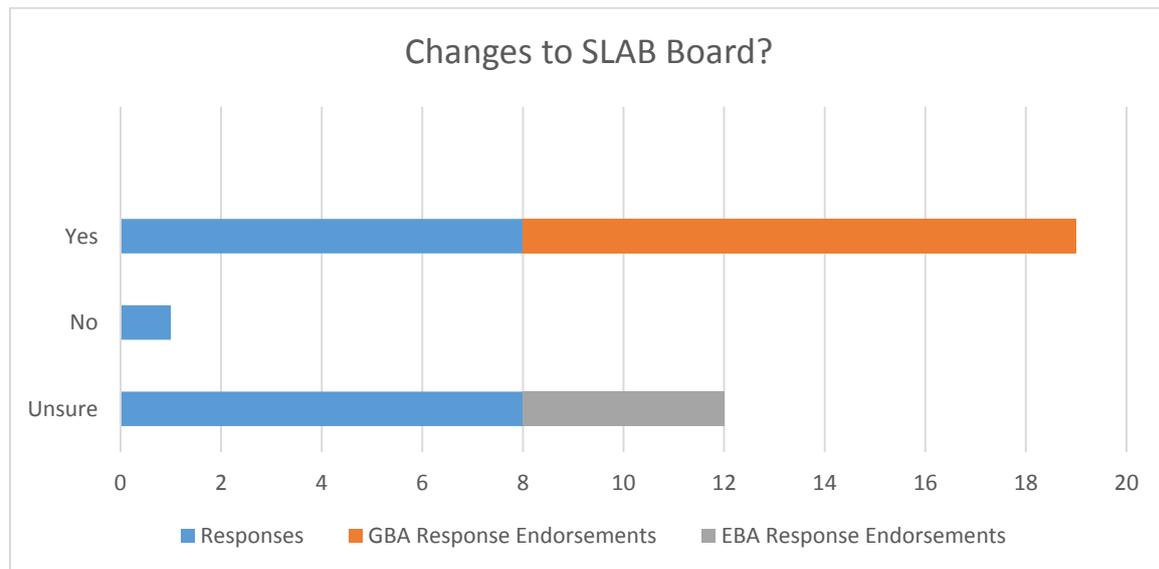
What checks or controls would you consider necessary if SLAB had statutory powers to operate more strategically?

Proposals included: Accountability to Scottish Ministers and Parliament, a public audit process, Scottish National Standards for Information and Advice Providers (SNSIAP) should be extended to a wider field and an Independent review body.

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

Yes – 19 (60%)
No – 1 (3%)
Unsure – 12 (37%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



60% of respondents answered “Yes” and a number of ideas were suggested in answer to this proposal. The GBA proposed that the Board should be elected. Faculty also suggest that a wider participation in governance may increase trust in the Board.

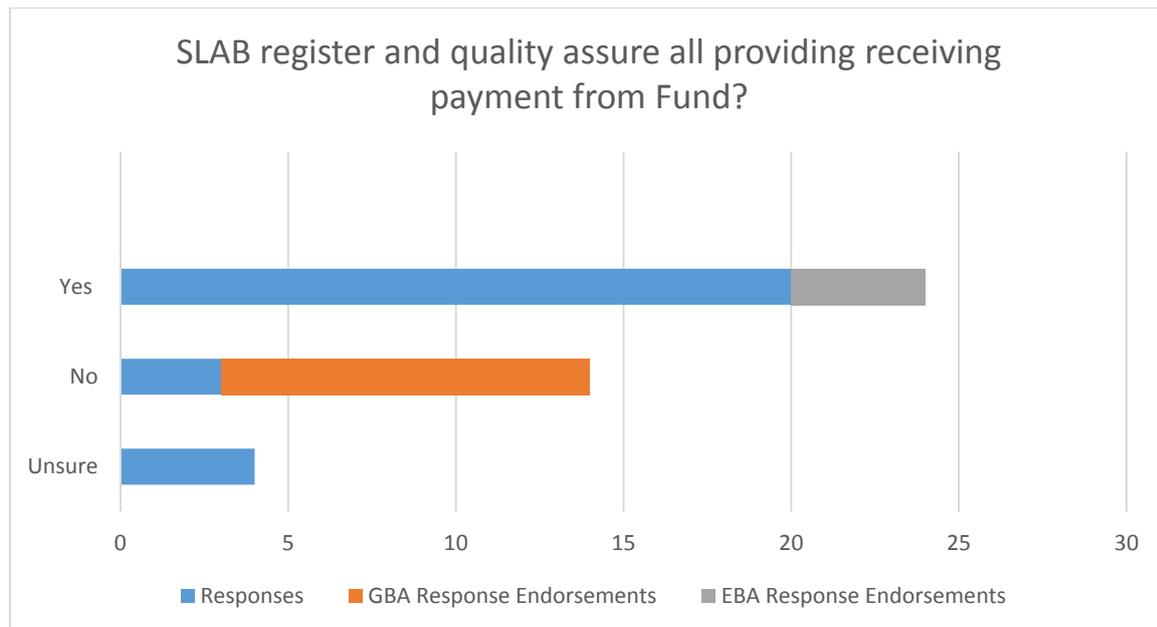
East Ayrshire Council wanted representation by local government, consumer and advice sectors on the Board. Other respondents also stated they wished to see consumer, third sector, client voice, social work, and Sheriff representation.

One concern was that it could turn into a stakeholder board, where representatives were conflicted over where their loyalties lie.

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

Yes – 24 (57%)
No – 14 (33%)
Unsure – 4 (10%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



The EBA is supportive of this proposal subject to the proviso that it does not lead to more stringent QA than other areas of public service. The LSS recognised that if there was wider use of lay advisers through legal aid then they should be subject to the same provisions as the legal profession. The GBA is opposed to the proposal stressing that the current provision already placed what could be considered an intolerable burden on firms.

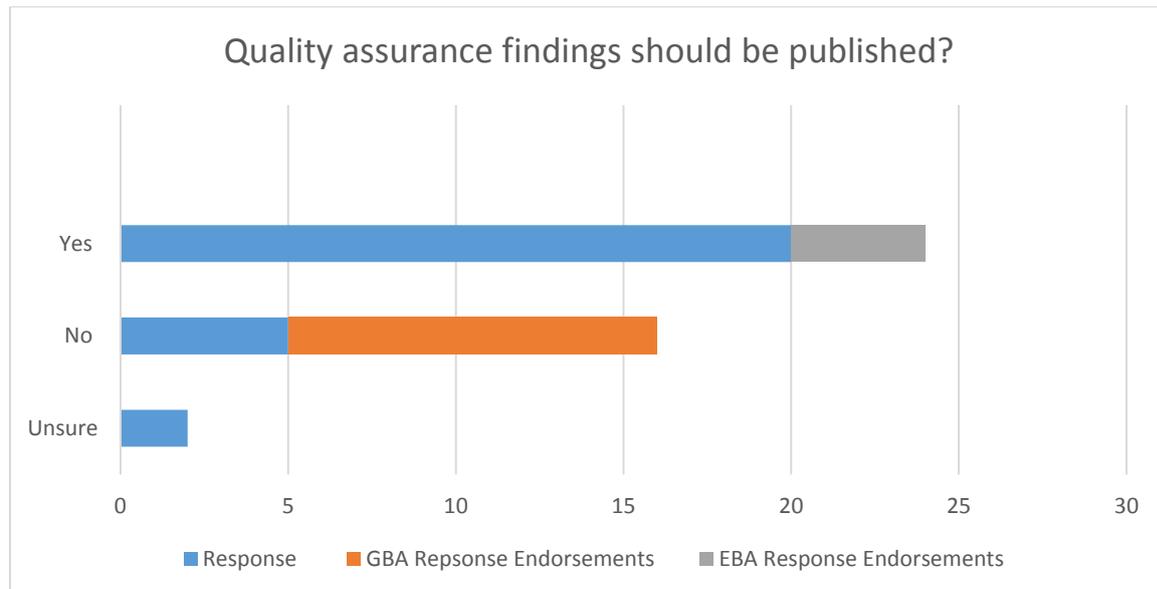
SALC supported more involvement in QA by the funder, particularly if done via an MoU. CAS support and believe that it would help the Scottish Government and SLAB to promote the significant work done through the Fund. SWA did support this, but again with the proviso that it does not duplicate current regulatory regimes and structures.

There is support for the register detailing what areas of specialism a provider has and that they have the necessary current training to provide it. Consistency in approach was the main take away from the responses here.

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

Yes – 24 (57%)
No – 16 (38%)
Unsure – 2 (5%)

This includes endorsements of EBA and GBA responses, but not those endorsing both since submissions differ on this question.



Overall 57% of respondents supported this and 38% were not in favour. The responses from legal profession diverge on this issue. The GBA and LSS are opposed to this proposal while the EBA is in favour. The overriding consensus however is that this would aid transparency and drive high standards.

It was noted that there is nothing to stop high performing firms from publishing results at present. CABx already publish their reviews.

There are a number of approaches that could achieve greater surety and control over outlays. How desirable on a scale of 1 – 5 (1 being very undesirable and 5 being very desirable) do you find the idea of the statutory framework to give SLAB powers to:

Fix a preferred supplier list and to set rates for commonly used experts?

Total responses - 18
Scored 3 or more – 14

EBA and LSS are in favour of this, although LSS states that there should be provision for experts not on the list to be instructed when required and exceptional

case fees allowed. GBA, Legal Spark, Faculty and Association of Personal Injury Lawyers did not support this on the basis that it risked creating a closed group of experts whose independence could be questioned. There was concern that the experts on the list would naturally become less suitably qualified than others receiving a private client fee.

SLAB should deal directly with the experts to arrange payment?

Total responses - 18
Scored 3 or more – 14

Strong support for this from the profession, this is a proposal they have previously suggested. The only exception is APIL who often require to seek experts from the wider UK due to the cases they are involved in, which often can be paid out from any settlement with cases, at their conclusion, being self-funding.

SLAB to 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?

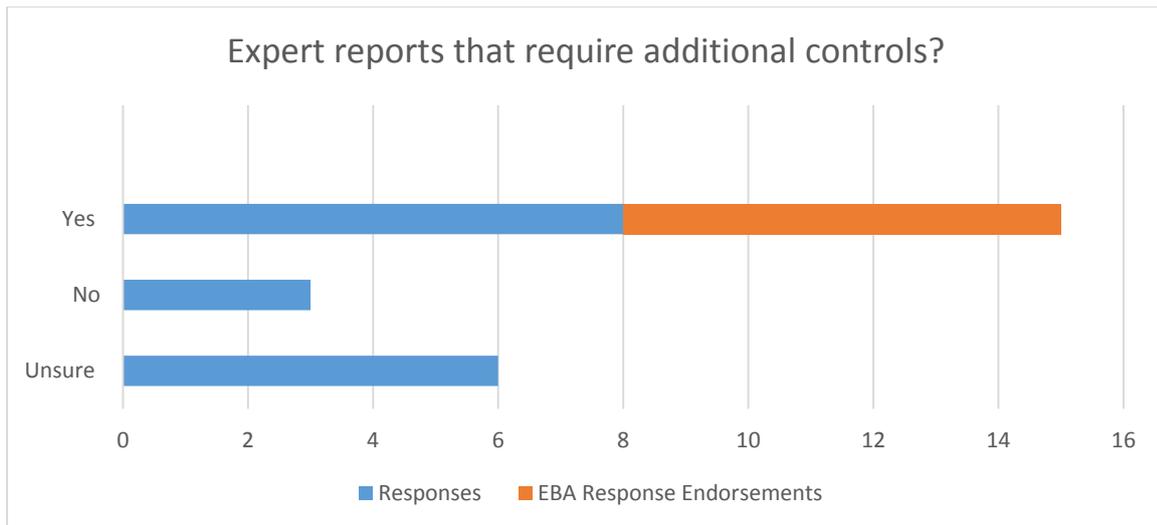
Total responses - 17
Scored 3 or more – 13

GBA, Legal Spark and APIL did not support this proposal, however all other respondents in the legal profession were in favour.

Although on basic numbers it appears that all proposals are supported the accompanying narrative to each response reveals a clear preference from the profession for SLAB to directly deal with paying experts. APIL do not wish any changes to be made to their area of law at all. Any change must have regard to the need to protect the independence and assure the competence of experts.

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

Yes – 15 (62%)
No – 3 (13%)
Unsure – 6 (25%)



Respondents stated:

- Child welfare reports should only be completed by persons with appropriate levels of training, to the level of police and social work joint investigative interview and be subject to regular evaluation.
- Higher cost reports or less frequently required reports could be subject to more control
- Mental health reports should not be rubberstamping previous expert reports
- Huge variation in fees charged by some experts – should be a fixed list of fees
- Expert reports required by people with disabilities should always be funded
- Birth, marriage and death certificates, Doctor's reports, Sheriff Officers' fees, Shorthand writers are areas which could be looked at for reform.

END OF ANALYSIS

5. Conclusion

This analysis demonstrates that there is sufficient support for the guiding principle of reform as set out in Part 1 of the consultation. While the results of the advisory payment panel are awaited the Scottish Government will continue to engage with key stakeholders with a view to introducing legislative reform.



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