



Scottish Legal
Aid Board

Analysis: Consultation
on the application of
the Interests of Justice
test in sheriff court
proceedings
November 2020

The Scottish Legal Aid Board

www.slab.org.uk

Executive Summary

1. The Scottish Legal Aid Board (SLAB) is a non-departmental public body responsible for the administration of the legal aid schemes in Scotland. This includes the schemes in relation to criminal legal assistance. In certain types of criminal proceedings, an ‘interests of justice’ eligibility test is applied, either by SLAB or by the solicitor.
2. Our policy is that the Interests of Justice (IoJ) test is met when an unrepresented accused person would be at a substantial disadvantage in relation to a prosecution and/or an unrepresented accused person faces serious consequences if convicted.
3. The consultation presented options for streamlining the application process for summary criminal legal assistance in the sheriff court. The core of the two options for change presented in the consultation was that the threshold for the IoJ test could be shown to be met solely on the basis that the applicant is being prosecuted in the sheriff court.
4. Our aim in exploring these options for change was to streamline our approach where possible, whilst continuing to meet our obligation to ensure that all funded cases meet the statutory tests. This aim is aligned with the Legal Aid Review’s strategic aim of maintaining scope but simplifying. ¹
5. We identified two options² for change:
 - Option A: any summary case prosecuted in the sheriff court is accepted as satisfying the IoJ test on that basis alone
 - Option B: as option A, except in those locations with no separate Justice of the Peace (JP) court, where all cases will be subject to the IoJ test
6. The IoJ consultation³ opened on 1 October 2020 and closed on 12 November 2020. We received five consultation responses. We received two responses from individuals and three from organisations. Four of five respondents supported Option A and one supported Option B.
7. One overall theme in response to the questions was how the outcome of applying the IoJ test in the JP court might affect equality groups. SLAB will

¹ <https://www.gov.scot/news/legal-aid-review/>

² A third option was explored but found to be infeasible. This was to apply the IoJ test in locations with no separate JP court if the case could be tracked as a JP case, notwithstanding it has to be heard in the sheriff court.

³ Available on our website at <https://www.slab.org.uk/app/uploads/2020/09/IoJ-consultation.docx>



take these observations into account as we finalise our Equality Impact Assessment and policy statement. These will set the parameters for the guidance to be followed by our decision makers. In turn this will allow us to clarify for solicitors how they can present evidence to us in relation to their client's relevant equality characteristics that will meet the statutory test.

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Background

8. The Scottish Legal Aid Board (SLAB) is a non-departmental public body responsible for the administration of the legal aid schemes in Scotland. This includes the schemes in relation to criminal legal assistance. In certain types of criminal proceedings, an ‘interests of justice’ eligibility test is applied, either by SLAB or by the solicitor.
9. Our policy is that the Interests of Justice (IoJ) test is met when an unrepresented accused person would be at a substantial disadvantage in relation to a prosecution and/or an unrepresented accused person faces serious consequences if convicted.
10. The consultation presented options for streamlining the application process for summary criminal legal assistance in the sheriff court. The core of the two options for change presented in the consultation was that the threshold for the IoJ test could be shown to be met solely on the basis that the applicant is being prosecuted in the sheriff court.
11. Our aim in exploring these options for change was to streamline our approach where possible, whilst continuing to meet our obligation to ensure that all funded cases meet the statutory tests. This aim is aligned with the Legal Aid Review’s strategic aim of maintaining scope but simplifying.⁴
12. We identified two options⁵ for change:
 - Option A: any summary case prosecuted in the sheriff court is accepted as satisfying the IoJ test on that basis alone
 - Option B: as option A, except in those locations with no separate Justice of the Peace (JP) court, where all cases will be subject to the IoJ test

Summary

13. The IoJ consultation⁶ opened on 1 October 2020 and closed on 12 November 2020. We issued the consultation to 73 organisations that spanned the criminal justice sector, representatives of equality groups and other third sector organisations that may have an interest in criminal legal aid policy. We sent the consultation to all criminal legal aid practitioners registered with SLAB’s communications team. This was supplemented by news items on the SLAB

⁴ <https://www.gov.scot/news/legal-aid-review/>

⁵ A third option was explored but found to be infeasible. This was to apply the IoJ test in locations with no separate JP court if the case could be tracked as a JP case, notwithstanding it has to be heard in the sheriff court.

⁶ Available on our website at <https://www.slab.org.uk/app/uploads/2020/09/IoJ-consultation.docx>

website and notifications on social media. Additionally, we sent out reminder emails.

14. We received five consultation responses. Four respondents agreed to have their response published and these are available on our website. We received two responses from individuals and three from organisations.
15. There were seven questions in the consultation, most of which were open ended. Respondents were not required to answer all questions. The number of respondents to each question are listed under each section below.
16. One overall theme in response to the questions was how the outcome of applying the loJ test in the JP court might affect equality groups. SLAB will take these observations into account as we finalise our Equality Impact Assessment and policy statement. These will set the parameters for the guidance to be followed by our decision makers. In turn this will allow us to clarify for solicitors how they can present evidence to us in relation to their client's relevant equality characteristics that will meet the statutory test.

Q1: Which option do you favour SLAB adopting

17. All respondents answered this question. Four of five respondents were in favour of Option A: any summary case being prosecuted in the sheriff court is accepted as satisfying the loJ test on that basis alone. One respondent was in favour of Option B: which would mean that the loJ test would apply as now in those locations with no separate JP court. No respondents were in favour of no change.
18. Respondents in favour of Option A gave reasons including simplification of processes, saving time, most applications for island courts being eligible in any event and consistency of eligibility across the country.
19. The respondent in favour of Option B was concerned by refusals of legal aid and by unrepresented accused in JP courts.

Q2: In the loJ test, we apply statutory and non-statutory factors. Do you have evidence in relation to how these might impact either positively or negatively on equality groups, or care experienced young people?

20. Four respondents answered this question. Two of these were concerned that equality groups being prosecuted in the JP court could be disadvantaged where they are not represented. One of these focussed on mental health and language barriers, whilst the other highlighted young people as potentially requiring representation given a recent consultation in relation to sentencing. One

respondent was of the view that any applicant would likely meet the factor concerned with the capacity of the applicant to understand proceedings or state their own case.

Q3: Do you have evidence that applicants in the JP court are more or less likely to come from vulnerable or disadvantaged equality groups or be care experienced, as compared to applicants in the sheriff court?

21. We received four responses to this question. One respondent commented that vulnerable groups including immigrant communities and people with mental health problems were part of the profile of the accused in the JP court. Two other respondents focussed on how the Crown Office and Procurator Fiscal Service marks cases for prosecution in either the JP or sheriff court, but no evidence was offered on whether the profile of accused was different to the sheriff court.

Q4: Do you have evidence about how island communities might be impacted by either of the change options?

22. Two respondents answered this question. One was concerned that if Option B was chosen, islanders would be made to pass tests that did not apply to mainlanders. They were of the view that having more people represented in island courts would be more efficient and make better use of limited sitting days. The other respondent was in favour of Option B as it could lead to an improvement in the perception of justice being done in the island communities.

Q5: What benefits or disadvantages can you see for solicitors and their clients of the change options?

23. All respondents answered this question. All could see a benefit in the change options from a quicker process for solicitors. Most respondents also mentioned that this would benefit clients in allowing solicitors to focus on advising clients rather than completing the loJ test. Responses also saw a benefit from a change in making eligibility easier to decide and explain, as it would be based only on financial assessment.

Q6: Are there wider benefits or disadvantages for the justice system which you could see coming from either of the change options?

24. All respondents answered this question. Two saw a benefit of saving in court time due to more people being represented. Two other respondents focussed

on the benefit of time saving for solicitors, as the number of represented clients would not increase much. One respondent focussed on a potentially greater role for SLAB in the JP court, which could increase training about the role of SLAB and how it operates within the judicial framework in Scotland.

Q7: To what extent if at all do you think that either of the change options could result in more legal aid applications than would have been submitted otherwise?

25. Three respondents provided a substantive answer to this question. Two others commented that they were not in a position to provide a view. Of the substantive responses, one did not anticipate any significant increase and one thought minor road traffic offences should be monitored. The third response welcomed any increase in applications for the JP court, although they did not link this specifically to either of the change options.

Appendix A: responses to the consultation

Respondent One: Individual - Anonymous

Question 1: Which option do you favour SLAB adopting?

Response: Option A - interests of justice satisfied solely on the basis of prosecution in the sheriff court.

Reason(s) for your answer:

Response: It simplifies the process for both practitioners and SLAB, and helps ensure accused access to legal representations.

Question 2: In the IOJ test, we apply statutory and non-statutory factors. Do you have evidence in relation to how these might impact either positively or negatively on equality groups, or care experienced young people?

Response: Option A ensures a more level playing field for everyone.

Question 3: Do you have evidence that applicants in the JP court are more or less likely to come from vulnerable or disadvantaged equality groups or be care experienced, as compared to applicants in the sheriff court?

Response: The Procurator Fiscal has discretion regarding which court to prosecute, I have seen cases in the JP court that would normally be prosecuted in Sheriff court, so very difficult to say.

Question 4: Do you have evidence about how island communities might be impacted by either of the change options?

Response: No.

Question 5: What benefits or disadvantages can you see for solicitors and their clients of the change options?

Response: Speeds up the process, allowing solicitors to focus on advising clients as opposed to form filling IOJ tests. Saves time.

Question 6: Are there wider benefits or disadvantages for the justice system which you could see coming from either of the change options?

Response: Option A, where an accused person is represented it saves court time compared to a person unrepresented - allows court to deal with court business much faster.

Question 7: To what extent, if at all, do you think that either of the change options could result in more legal aid applications than would have been submitted otherwise?

Response: Hard to say, but SLAB has the figures for legal aid applications refused solely on IOJ test.

Respondent Two: Organisation - Edinburgh Bar Association

Question 1: Which option do you favour SLAB adopting?

Response: Option A - interests of justice satisfied solely on the basis of prosecution in the sheriff court.

Reason(s) for your answer:

Response: We agree with the reasons set out in the consultation document. Option A would help to streamline the application process and reduce time spent on administration by SLAB and practitioners.

Question 2: In the IoJ test, we apply statutory and non-statutory factors. Do you have evidence in relation to how these might impact either positively or negatively on equality groups, or care experienced young people?

Response: Not answered.

Question 3: Do you have evidence that applicants in the JP court are more or less likely to come from vulnerable or disadvantaged equality groups or be care experienced, as compared to applicants in the sheriff court?

Response: Not answered.

Question 4: Do you have evidence about how island communities might be impacted by either of the change options?

Response: Not answered.

Question 5: What benefits or disadvantages can you see for solicitors and their clients of the change options?

Response: Option A should reduce the time and resources spent on submitting and processing applications. Knowing that cases in the Sheriff Court will be judged on financial eligibility only should provide some clarity to applicants.

Question 6: Are there wider benefits or disadvantages for the justice system which you could see coming from either of the change options?

Response: Option A will not greatly change the number of applications granted. The advantage will be in saving time and resources. We wish to see some of that saving redirected to other aspects of legal aid funding.

Question 7: To what extent, if at all, do you think that either of the change options could result in more legal aid applications than would have been submitted otherwise?

Response: We welcome the change but do not anticipate any significant increase in applications.

Respondent Three: Organisation - Scottish Justices Association

Question 1: Which option do you favour SLAB adopting?

Response: Option B - As option A, but current policy retained for areas with no separate JP court.

Reason(s) for your answer:

Response: The SJA do welcome greater involvement from SLAB in all summary criminal cases. Whilst we clearly have some concern about the adoption of a change to the basic principle that all should be treated the same under the law, we do recognise that greater SLAB involvement in JP cases is a welcome step forward where there is no separate JP court. Overall JPs are concerned that many cases are adjourned or otherwise delayed by the refusal of legal aid by SLAB. We are seeing a significant rise in a number of road traffic offences where the impact on an individual and potentially their family is disproportionate to the offence. In many instances the accused is simply unaware of an Exceptional Hardship or Special Reasons defence. This situation is exacerbated during the current pandemic circumstances and the fact that some JP courts have been disqualifying drivers without them being present in court. This situation currently exists in GH&I and SSD&G Sheriffdoms.

Question 2: In the IoJ test, we apply statutory and non-statutory factors. Do you have evidence in relation to how these might impact either positively or negatively on equality groups, or care experienced young people?

Response: Whilst we do not have access to the detailed information on the analysis of offenders, the empirical view of our members is that there has been an increase in the cases coming to the JP courts where the mental health of the offender is a significant factor, or where there is a language difficulty due to the increased number of immigrants. Frequently the Courts are having to instruct interpreters or seek some medical statement as to the fitness of offenders and their capability to plead.

Question 3: Do you have evidence that applicants in the JP court are more or less likely to come from vulnerable or disadvantaged equality groups or be care experienced, as compared to applicants in the sheriff court?

Response: Unfortunately the SJA does not have access to all of the comparative data and we do rely on the experiences of our members whilst on the bench, however, the general view is that the immigrant community and those with minor mental health issues do tend to be charged with the more minor offences that are heard in the JP court (breach of the peace, minor assault and driving offences).

Question 4: Do you have evidence about how island communities might be impacted by either of the change options?

Response: The SJA would hope that the proposed change would lead to an overall improvement in the perception of justice being done in the island communities.

Question 5: What benefits or disadvantages can you see for solicitors and their clients of the change options?

Response: It should certainly simplify the approach for solicitors and help them to advise their clients knowing of the availability of SLAB support. It should also be a significant benefit to all clients in that professional legal support is available for them. Many unrepresented accused fail to understand the court processes and proceedings and frequently fail to have a fair hearing simply due to their ignorance of these processes.

Question 6: Are there wider benefits or disadvantages for the justice system which you could see coming from either of the change options?

Response: Potentially a greater role for SLAB in the JP courts. It also has the potential to open the door for greater JP training into the role of SLAB and how it operates within the judicial framework in Scotland.

Question 7: To what extent, if at all, do you think that either of the change options could result in more legal aid applications than would have been submitted otherwise?

Response: The SJA believe that more applications for legal aid should improve the justice system in that simple guidance on the courts and the law would be of major benefit to the entire system as it would allow accused individuals a better understanding of what they should do. Many not guilty pleas may be avoided if the accused fully understood the processes that have to be followed and the fact that justice has to be done.

Respondent Four: Organisation - Law Society of Scotland

Question 1: Which option do you favour SLAB adopting?

Response: Option A - interests of justice satisfied solely on the basis of prosecution in the sheriff court.

Reason(s) for your answer:

Response: We support Option A out of the three provided. We do not support No Change for the reasons relating to the streamlining/simplification of legal aid. There seems no practical justification for Option B as this would mean that all cases calling in the six courts which do not have a JP courts would require to satisfy the loJ test. That means increased paperwork for those involved in these courts, including SLAB and the profession. That seems to us to be potentially discriminatory and adversely affecting access to justice. As no matter how slim the risk, there is a risk that legal aid may be refused in a case where if the applicant lived elsewhere, they would have been in receipt. For consistency purposes, we agree that where there is any risk that Option A must present the better and preferred option.

Question 2: In the loJ test, we apply statutory and non-statutory factors. Do you have evidence in relation to how these might impact either positively or negatively on equality groups, or care experienced young people?

Response: If the consultation results in the removal of the loJ test except in JP cases, those within these groups may well be disadvantaged. If the case is marked to the JP court, they may not have legal aid granted whereas it would have been granted if the case had been raised in the sheriff court. Quite correctly, the Crown Office and Procurator Fiscal Service has the discretion as to if and where any case is to be prosecuted. With national marking, there may be some consistency over Scotland as to which cases are prosecuted in which court. However, there can be local factors as to why prosecution in one jurisdiction may take place within the sheriff court and over time, there are changes in marking policy which may and will subsequently impact on access to legal aid. We have concerns that information regarding those who are vulnerable accused and who may fall within any of the “protected characteristics” groups could be impacted adversely as the vulnerability of the accused would not usually be a reason or a factor taken into account for a case to be marked to the sheriff rather than the JP court. That could adversely impact on those falling within those groups. Reference is made to the recent Scottish Sentencing Council’s consultation on “Sentencing young people guideline” where there was a stress on the age of the accused and factors to be relevant in sentencing. It was recognised that the sentencing of young people is complex and challenging, requiring an individualistic approach. These may well be factors justifying the grant of summary legal aid or ABWOR to that category on account of their age and the impact of sentencing, irrespective of the court in which the case is being prosecuted.

Question 3: Do you have evidence that applicants in the JP court are more or less likely to come from vulnerable or disadvantaged equality groups or be care experienced, as compared to applicants in the sheriff court?

Response: We refer to our answer in Question 2. As stated above, it is not the accused's circumstances that factor into the decisions being made by COPFS as to where to prosecute. The COPFS prosecutorial code with reference to public interest at paragraph 6(iii) mentions the "age, background and personal circumstances of the accused." These are factors that may influence the prosecutor in favour of action other than prosecution. Though that may mean less prosecutions, in cases where prosecutions are initiated, there could be disadvantages in the continued application of the lofJ test in JP cases. We understand that SLAB is undertaking an equalities impact assessment in connection with this proposed policy change. We consider that sight of this assessment is important. Though the removal of the lofJ test is of benefit to those appearing in the sheriff court, requiring those appearing in the JP court to satisfy the lofJ test could for some be adversely onerous and could result in the refusal of legal aid. The implication regarding sentence can be equally significant.

Question 4: Do you have evidence about how island communities might be impacted by either of the change options?

Response: No comment.

Question 5: What benefits or disadvantages can you see for solicitors and their clients of the change options?

Response: There should be a benefit with simplification and speed of process to solicitors who will not need to justify the grant of legal aid by means of the loJ test. Similarly, it should be more straightforward to advise a client that they will be eligible for summary criminal legal aid or ABWOR based on the straightforward assessment of their financial eligibility. This should make it more consistent as application of financial criteria is less open to variable or hard decisions.

Question 6: Are there wider benefits or disadvantages for the justice system which you could see coming from either of the change options?

Response: There is benefit in the reduction of paperwork by removing the loJ test and consequentially, the time spent in needing to establish the grant of summary criminal legal aid and ABWOR.

Question 7: To what extent, if at all, do you think that either of the change options could result in more legal aid applications than would have been submitted otherwise?

Response: Any response which we could give would merely be anecdotal.