

Scottish Legal Aid Board consultation

Consultation on the application of the Interests of Justice test in sheriff court proceedings

October 2020

# **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’ test is applied, either by SLAB or by the solicitor. SLAB is now consulting on a range of options for changing how this test is applied, taking into account the operation of the justice system and in particular the profile of cases prosecuted in the sheriff court.
2. The Interests of Justice test (IoJ test) is framed by reference to a range of statutory factors in the legislation governing the legal aid schemes, but the term itself is not defined and the application of the test requires the exercise of discretion by either SLAB (for summary criminal legal aid) or the solicitor (for ABWOR). Our policy is that the 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. This consultation presents options for streamlining the application process for summary criminal legal assistance in the sheriff court. We are focusing on the sheriff court because our data suggests that a very small number of applications in respect of sheriff court cases are ever refused solely on interests of justice grounds.
4. Fewer cases at the JP court level meet the threshold of an unrepresented accused person being at a substantial disadvantage in relation to the prosecution and/or facing serious consequences if convicted. We are not therefore proposing any change in our approach to cases calling at the JP court and so will continue to apply all the relevant statutory and non-statutory factors.
5. For the sheriff court however we have considered whether our current approach is both proportionate and rational and have identified two possible alternatives. We are not proposing a change in our policy as to the threshold to be met for us or solicitors to be satisfied that a grant of legal aid or ABWOR is in the interests of justice. Instead the consultation focuses on how we determine whether that threshold is met.
6. At present, we ask solicitors to address one or more of the factors set out in the legislation and our guidance, and to provide supporting information in respect of each factor addressed. We then assess, on the basis of this information or other information available to us about the case, whether the threshold is met to allow a grant to be made.
7. The core of the two options for change presented in this consultation is that the threshold for the IoJ test could instead be shown to be met solely on the basis that the applicant is being prosecuted in the sheriff court and irrespective of the weight, if any, that might otherwise separately attach to any other aspect of the test as currently applied.
8. Our aim in exploring these options for change is to streamline our approach where possible, whilst continuing to meet our obligation to ensure that all funded cases meet the statutory tests. This change on which we are consulting is therefore aligned with the Legal Aid Review’s strategic aim of maintaining scope but simplifying. [[1]](#footnote-2)
9. Alongside retaining the current approach, we have identified two options[[2]](#footnote-3) for change:
   1. Option A: any summary case being prosecuted in the sheriff court is accepted as satisfying the IoJ test on that basis alone
   2. Option B: as option A, except in locations with no separate JP court, where all cases will be subject to the IoJ test
10. We are not proposing any change in approach to JP cases, and so will continue to require applicants to provide information so that we can assess whether the IoJ threshold is met by reference to the range of individual factors as at present. We are however undertaking an equalities impact assessment of that approach and seek evidence to support that assessment – as well as the potential changes in respect of sheriff court cases - as part of this consultation.

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## Why are we consulting?

1. We are seeking your views on the options we’ve identified for changing our approach to the application of the IoJ test in the sheriff court and their relative benefits and disadvantages: in particular, whether this is a desirable change, anything you can tell us about possible impacts for applicants with protected characteristics, and impacts in areas with no JP court. We are also keen to hear about any benefits for solicitors and any possible unintended consequences.

## Background to SLAB

1. SLAB was set up in 1987 to manage legal aid in Scotland. We are a non-departmental public body responsible to the Scottish Government. Our core business is taking decisions in connection with applications for legal aid. You can find out more about what we do on our website.[[3]](#footnote-4)
2. As a public body our powers, functions and duties are set out in the legal aid legislation. That legislation defines precisely how some elements of the legal aid regime must operate but SLAB is also given discretion in relation to the operation of other elements. The exercise of such discretion is subject to the wider provisions and principles of administrative law such as, for example, that decision making must be rational and proportionate. One area of discretion relates to the operation of some components of statutory eligibility tests.

## The Legal Aid Review: maintain scope but simplify

1. We have been working with government colleagues to agree a programme of work that can give effect to some of the themes set out in “An independent strategic review of legal aid in Scotland”[[4]](#footnote-5) and the Scottish Government’s recent consultation[[5]](#footnote-6) in advance of any changes that Government may decide to take forward through new legislation.
2. There was strong support in the consultation for simplification of the current system, whilst maintaining broad scope. Our initial agreed focus has therefore been on identifying ways to simplify the operation of the system where that can be done within the existing statutory framework. As part of this programme of work, we have identified the application of the IoJ test in summary criminal cases (legal aid and ABWOR) as one area with scope for potential simplification.

## Background to the Interests of Justice test

1. In addition to a means test, the Interests of Justice (IoJ) test is applied in relation to summary criminal proceedings to determine the availability of either Summary Criminal Legal Aid (SCLA) or Assistance by Way of Representation (ABWOR), the latter only where the client is not appearing from custody.
2. The factors set out in the 1986 Act for the IoJ test[[6]](#footnote-7) are based on the Widgery Criteria, which were formulated in 1966.[[7]](#footnote-8) The factors frame the decision around whether representation in criminal cases is required to be funded by the public purse. The structure of the 1986 Act’s test structure clearly envisages that not all cases should attract public funding. Such an outcome is consistent with decisions by the European Court of Human Rights, which have outlined similar factors, focussing on the seriousness of the disposals available and the complexity of the case in determining whether representation is required to secure a fair trial[[8]](#footnote-9) and ensure that the unrepresented party is not at a substantial disadvantage in relation to the prosecution.[[9]](#footnote-10),[[10]](#footnote-11)
3. Whilst the IoJ test is framed with reference to a non-exhaustive range of statutory factors in the 1986 Act, the term itself is not defined. As the case of K v. The Scottish Legal Aid Board 1989 SCLR 144 demonstrated, SLAB may decide to grant legal aid on the basis of factors other than those listed at section 24(3) of the Act.

## Current approach to the application of the Interest of Justice test

### Key features of the approach: summary criminal legal aid

1. In applying the interests of justice test in respect of applications for summary criminal legal aid we consider a number of factors:
   * All of the statutory factors:
     + the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty
     + the determination of the case may involve consideration of a substantial question of law, or of evidence of a complex or difficult nature
     + the accused may be unable to understand the proceedings or to state his own case because of his age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise
     + it is in the interests of someone other than the accused that the accused be legally represented;
     + the defence to be advanced by the accused does not appear to be frivolous
     + the accused has been remanded in custody pending trial
   * The statutory factor of loss of livelihood, considered as part of an expanded non-statutory factor:
     + there is likely to be a loss of livelihood or other effects of conviction such as damage to reputation, blighting career prospects, psychological trauma, emigration or travel difficulties, potential loss of tenancy or inability to find a mortgage, impact on caring responsibilities such as contact with children
   * One wholly non-statutory factor:
     + the co-accused has been granted legal aid and is incriminating the applicant
2. We do not consider any other factors.
3. To enable us to consider these factors, our current application processes request a range of information from the applicant’s solicitor. We consider each factor where the solicitor has provided information.
4. If the specific information provided in the application in relation to one or more of the factors is insufficient for assessment purposes, we will then look for other information that may be relevant to each factor e.g. in the complaint, previous convictions and the summary of evidence, before coming to a view on whether the IoJ test has been met.
5. The policy we apply in coming to that view is that the IoJ test is met where, having considered the factors set out above, we are satisfied that an unrepresented accused person would be at a substantial disadvantage in relation to the prosecution and/or an unrepresented accused person faces serious consequences if convicted.
6. We can be satisfied that the test is met on the basis of information pertaining to a single factor or multiple factors.

### Key features of the approach: ABWOR

1. For ABWOR, the solicitor applies the IoJ test. SLAB’s role is to check that the solicitor has done so in accordance with the relevant rules and that they have adequately assessed or verified relevant factors. We do so by reference to the guidance we have issued on the application of the rules. In order to correctly make an ABWOR grant the solicitor should consider one or more of the following factors:
   * The statutory factors:
     + the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty
     + the determination of the case may involve consideration of a substantial question of law, or of evidence of a complex or difficult nature
     + the accused may be unable to understand the proceedings or to state his own case because of his age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise
   * The statutory factor of loss of livelihood, as part of an expanded non-statutory factor:
     + there is likely to be a loss of livelihood or other effects of conviction such as damage to reputation, blighting career prospects, psychological trauma, emigration or travel difficulties, potential loss of tenancy or inability to find a mortgage, impact on caring responsibilities- such as contact with children
2. The solicitor should not consider any other factors. The test can be met on the basis of information pertaining to a single factor or multiple factors.
3. Our policy is that we will approve a solicitor’s grant of ABWOR if we are satisfied on the basis of the information provided that the solicitor had properly decided that the test was met on the basis of one or more of the specified factors.

### Outcomes and impact of the policy

1. We refuse very few applications for summary criminal legal aid on the basis that the IoJ test has not been met.
2. Summary cases can be prosecuted in either the Justice of the Peace Court or the sheriff court: the nature of the charge and court type is important context for our decision, particularly in relation to the disposals available, and this is apparent from the data on grants.
3. In 2018/19, there were 36,486 applications for summary criminal legal aid for sheriff court cases, and in 23 of these cases legal aid was refused on the basis that the IoJ test had not been met (0.1%). Of these 23 cases, 8 were granted after review, leaving only 15 sheriff court applications in 2018/19 which were actually refused on IoJ grounds. By contrast, we refused 13% of JP court applications on IoJ grounds in 2018/19.
4. A smaller number of ABWOR cases are also subject to the IoJ test in non-custody cases. As noted above, the solicitor applies the IoJ test in these cases, with their application of the test subject to checking by SLAB. In 2018/19, solicitors intimated 4,683 IoJ ABWOR grants in the sheriff courts. Only 48 of these (1.0%) were not approved by SLAB. At JP level, there were 1,958 relevant grants, with 272 (16.5%) not approved by SLAB.
5. We estimate that in 2018/19, the time spent by SLAB on assessing the interests of justice in sheriff court cases amounted to just over 3,300 staff hours in total (the equivalent of around two full time members of staff).
6. SLAB does not hold any data on the amount of time spent by solicitors on addressing the IoJ test in their applications, but we anticipate the aggregate amount is likely to be of the same order as that spent by SLAB.

## Policy Options

### No change: maintain current application of the IoJ test in both sheriff and JP courts

1. Under this option, solicitors continue to assess the IoJ factors for ABWOR and provide information to SLAB to support consideration of the factors on all summary cases. SLAB staff continue to assess and check all summary legal aid applications and ABWOR grants.
2. While the existing policy allows for highly individualised decisions taking circumstances fully into account, solicitors are required to consider and address why they think the test is met in every application made to SLAB, and to provide information to enable us to assess the relevant factors and apply our discretion in line with the policy. Solicitors are also required to demonstrate, with supporting information, how they have applied their own discretion with every ABWOR grant.
3. The current policy acts as a control against the risk that public funding supports representation in sheriff court cases that do not meet the test. However, the data demonstrates that this risk is very low indeed, suggesting that the control may be disproportionate to the likelihood or impact of the risk.

#### SLAB’s statutory duties (equalities impact, corporate parenting)

1. SLAB’s policy is that we look for evidence supporting a grant against one or more factors: we do not have to be satisfied on all factors, and evidence that one or more factors are not satisfied is not weighed against evidence supporting another factor. Our assessment of the impact of that policy on applicants with protected characteristics (referred to as an EqIA) or who are care experienced is that it mitigates any potential negative impacts of a test focused on a single factor, or requiring multiple factors to be satisfied. As part of this consultation we are interested in views on how the current policy impacts on different equality groups or those with care experience.

### Option A: any summary case being prosecuted in the sheriff court is considered to satisfy the IoJ test

1. Our current policy threshold is that the 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. An important part of the context for our consideration of this policy is the modern role of the sheriff court, and the range of cases set for prosecution in that court as a result of the application of prosecution policy.
2. Our assessment is that this context creates an inherent likelihood - or near certainty - of any case being prosecuted in the sheriff court being able to satisfy one or more of the factors set out earlier in the paper, thereby enabling us to grant summary criminal legal aid, or a solicitor to grant ABWOR. As such, it appears to us that the very fact of prosecution in the sheriff court is sufficient evidence that it is in the interests of justice for publicly funded representation to be provided.
3. Were such a conclusion to be incorporated into a revised SLAB policy, both for the application of its own discretion and for approving the application of solicitor’s discretion when granting ABWOR, this would mean that solicitors would no longer have to spend time specifically addressing multiple separate IoJ factors as part of an application for legal aid or when considering a possible grant of ABWOR. All that would be required would be information to support the mean test and confirmation (and appropriate supporting evidence) that the case is at sheriff court level.
4. We also anticipate that such a change could result in benefits for the broader justice system. It could speed up the application process and make clearer to sheriffs that the only issue under consideration is financial eligibility where an issue arises in the course of a case.
5. A more systematic, high level approach to the IoJ test reduces the complexity of assessment across multiple factors and therefore reduces the risk of human error, or inconsistency in the application of the policy by different decision-makers (whether SLAB or solicitors).
6. This option maintains scope, whilst simplifying the applications process and enabling the creation of much more straightforward guidance.
7. There is some risk of ‘net widening’ associated with this option, in that some cases that might be refused under the existing IoJ policy would be granted under the policy set out in this option, simply by virtue of being heard in the sheriff court. As the data set out in paragraph 29 suggests, the number of such cases is likely to be very low indeed relative to the total number of applications and grants. Particularly in light of the ongoing cost to SLAB and the profession in applying the current policy, we consider that the additional cost of these cases (and any possible objection on grounds of principle) is significantly outweighed by the benefits of this option.
8. A further aspect of net widening is the potential for any revised policy to encourage applications to be made in cases where at present the solicitor would otherwise have advised against this on the basis that the IoJ test was unlikely to be satisfied. Again, given the very low current IoJ refusal rate for sheriff court cases, this does not appear likely to be a significant risk (in contrast to the JP court, where more applications are refused and a far higher proportion of ‘low tariff’ – predominantly road traffic - cases are likely to proceed either without representation or on a privately funded basis).
9. This option does not take into account the position of the six court areas with no Justice of the Peace Court.[[11]](#footnote-12) These rural and island courts handle a very small number of cases, but it is assumed that at least some of the cases in these sheriff courts would otherwise be prosecuted in the JP courts elsewhere. There is therefore a risk that some cases in these six locations would be granted, whereas under the current policy they might be refused on IoJ grounds.
10. We anticipate that the number of these cases would be very small. At a national level, the split of summary cases between sheriff and JP courts is 84:16. For illustrative purposes, and working on the assumption that 16% of the total applications in the six courts would have been marked for JP elsewhere, this would amount to around 45 summary legal aid cases per year, of which an average of around 13% - or 6 cases – might have been expected to be refused on IoJ grounds under the current policy.
11. This analysis is based on current application volumes. There is perhaps a greater risk of net widening in these six courts, given that a wider range of case types are heard in these courts, including some comparatively minor matters that might not result in an application for legal aid or grant of ABWOR at present. Given the total case volumes in these six courts, we consider that this risk is still low when set against the far larger number of cases that will benefit from the approach set out in this option.
12. A further risk associated with this option is that it is very much focused on the current range of cases heard in the sheriff court. Should that range of cases change in future, it may become less likely that all applications would meet the IoJ threshold simply by virtue of being prosecuted in the sheriff court. To mitigate both this risk and the risk of net widening outlined above, the number and essential features of cases would have to be monitored on an ongoing basis.

#### SLAB’s statutory duties (equalities impact, corporate parenting)

1. In terms of equalities impacts, SLAB’s assessment is that this policy option may have a slight positive impact associated with the changes to the application process which would support implementation of the policy.
2. As five of the six locations without a JP courts are on Scotland’s islands, an Islands Act assessment would be appropriate in this context.[[12]](#footnote-13) In this case, as the policy is applied in the same way to all courts, our conclusion is that there is no differential impact that disadvantages island communities.[[13]](#footnote-14)

### Option B: as option A, except in locations with no JP court, where all cases will be subject to the IoJ test

1. This option reduces the scope of Option A to exclude sheriff summary cases in the six locations with no JP court.
2. The impact would be that in these six sheriff courts, all cases - including not only those that may have been marked as JP Court cases elsewhere, but also those that would have been marked as sheriff court cases - would have to be assessed against the Interest of Justice test in terms of the current policy. This would therefore result in geographically localised policy whereby applications in specific areas would be subject to a higher administrative burden and a greater degree of scrutiny, which may not be commensurate with the actual risk involved: as described at paragraph 47, continuing to apply the current policy to all cases across the six courts may affect as few as six cases when compared to applying the approach set out under option A.
3. The broader impact would be that solicitors in those areas would continue to be required to consider detailed information when granting ABWOR and to provide SLAB with information to enable assessment of the IoJ test in line with the current policy. There is a risk that option B could result in some sheriff court applicants in these areas being treated less favourably than those in other areas, should legal aid be refused on the basis of the assessment of their application against the current factors. Given the very low IoJ refusal rate for sheriff court cases at present, that risk is considered low. Nevertheless, we would suggest that even a very small risk of some applicants being prejudiced under Option B outweighs the converse risk that a small number of low tariff applicants benefit under Option A.
4. As with the option above, one outcome of this option would be marginally increased costs to the Fund and the potential for additional applications that would not meet the current IoJ test.

#### SLAB’s statutory duties (equalities impact, corporate parenting)

1. In terms of equalities impacts, SLAB’s assessment is that this policy option may have a slight positive impact associated with the changes to the applications process which would support implementation of the policy – albeit those benefits would not arise in the six areas carved out of the general policy approach under option B.
2. As noted above, five of the six locations without a JP courts are on Scotland’s islands, and thus an Islands Act assessment would be appropriate in this context. In this case, the proposed policy would have a different impact on island communities. SLAB assesses that this differential impact could be justifiable in terms of the management of risks to the public purse. However, we acknowledge that any financial benefit is likely to be marginal and probably outweighed by the (also small) risk arising from differential treatment of applications.

## Responding to this consultation

1. We have included some specific questions in the Consultation Questionnaire which we are seeking your views on. However, respondents are not required to submit an answer to all questions and can choose to answer some or all of the questions as they choose.
2. Of course, views on any other matter would also be most welcome. Please address these in the area provided at the end of the questionnaire.
3. SLAB looks forward to receiving your views on these issues and other aspects of the proposed changes to the Interest of Justice test in summary criminal proceedings.

#### Deadline

1. Consultation on the proposed changes runs for a six week period from 01 October 2020. Please ensure any responses are submitted to us by 5pm on 12 November 2020.

#### How to respond

##### Online

1. You can respond using our [online Consultation Questionnaire](https://www.slab.org.uk/ioj-consultation/).

##### By email

1. If you wish to respond by email, please complete the Consultation Questionnaire provided in Annex A.
2. Completed questionnaires should be emailed to: [consultations@slab.org.uk](mailto:consultations@slab.org.uk)

**Enquiries:** If you have a query about the consultation process, please contact:

1. Kingsley Thomas, Head of Criminal Legal Assistance, [thomaski@slab.org.uk](mailto:thomaski@slab.org.uk)

## Annex A: consultation questionnaire

[Consultation questionnaire (Word)](https://www.slab.org.uk/app/uploads/2020/09/Appendix-A-IoJ-Questionnaire.docx)

1. <https://www.gov.scot/news/legal-aid-review/> [↑](#footnote-ref-2)
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. [↑](#footnote-ref-3)
3. <https://www.slab.org.uk/corporate-information/what-we-do/> [↑](#footnote-ref-4)
4. The report can be found at- <https://www2.gov.scot/Topics/archive/reviews/legal-aid-review> [↑](#footnote-ref-5)
5. <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/> [↑](#footnote-ref-6)
6. Section 24 (3) of the 1986 Act, <https://www.legislation.gov.uk/ukpga/1986/47/section/24> [↑](#footnote-ref-7)
7. <https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/746/74605.htm#note9> [↑](#footnote-ref-8)
8. [2009 Council of Europe compendium on criminal procedure](file:///\\cifssata\Common\Common\Shared\File%20Sharing\GALA\Policy%20statement%20development\GALA001%20IoJ\pub_coe_criminal_procedure_2009_eng%20(p249).pdf), p.249 [↑](#footnote-ref-9)
9. In K v. The Scottish Legal Aid Board 1989 SCLR 144 it was noted that the fact that the defendant would find representation desirable, it is for SLAB to decide if “in the absence of such representation justice would not be done, to the disadvantage of the applicant.” [↑](#footnote-ref-10)
10. European Court of Human Rights - case of Steel and Morris v. the UK (2005) <https://www.legislationline.org/documents/id/17231> [↑](#footnote-ref-11)
11. The six courts are Kirkwall, Lerwick, Lochmaddy, Portree, Stornoway, and Wick, with only the latter being on the mainland. They accounted for 2% (1,188) of national summary court complaints registered in 2018/19. For summary legal aid in the sheriff court, applications in these courts account for 0.9% of the total. [↑](#footnote-ref-12)
12. Although these legislative provisions are not yet in force. [↑](#footnote-ref-13)
13. Indeed, as noted above, to some extent, applicants in islands courts may be subjected to a lesser degree of scrutiny than elsewhere in Scotland. [↑](#footnote-ref-14)