



Response to consultation on our policies on A&A and ABWOR

June 2024

The Scottish Legal Aid Board

www.slab.org.uk

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Our response to the consultation

1. We [consulted](#) on our policies on advice and assistance (A&A) and Assistance By Way Of Representation (ABWOR) in autumn of 2023. Thanks to all who took the time to respond to the written consultation.
2. The consultation was general in nature, with the questions being broad and open-ended, rather than specific to any of the many sub-policies within the overall ambit of A&A. We did, however, specifically ask for any views on the equalities implications of our policies. The intention behind this framing was to gather as broad a range of input as possible.

Summary of issues raised and our response

3. We received three responses to the consultation, all from solicitors.

These did not focus exclusively on our policies on A&A/ABWOR, but also raised a range of points with broader relevance. A summary of the key points made is provided below and the responses are provided in full in the [appendix](#).

Payment rates for interpreters

4. One response suggested that current standard payment rates for interpreters are no longer competitive, leading to difficulties in firms accessing suitable face-to-face interpreters, such that some assisted persons may be unduly disadvantaged by the current policy.
5. We are not aware of any generalised issues with access to interpreters. With regards to the taxation standard we are to apply when considering our accounts policies, our position is that we are not required to guarantee that a firm's interpreters of choice can be instructed,

regardless of the costs. Furthermore, a specific interpreting firm raising their hourly rates will not in itself be a reason for reviewing our standard rates. We are not inclined to revise our standard rates at present.

6. We will log the feedback received and any other concerns raised to feed into our review of the policy (including the rates) in line with the currently planned review date (September 2025).
7. We will raise this issue with the Scottish Immigration Law Practitioners Association to obtain a wider view.

Distinct matters/fresh grants

8. One response noted the potential implications of the Illegal Migration Act on our policy with regards to distinct matters. It was suggested that the number of fresh applications that may be required, should the relevant parts of the Act come into force, may be disproportionate.
9. A further response also highlighted the position around fresh grants of A&A, this time in the context of children's work. Again, it was suggested that the number of fresh grants that can be required under current arrangements may not be proportionate, including because of current levels of remuneration.
10. In the civil context, with regards to the potential implications of the Illegal Migration Act, we note that the legislation has been passed by the UK Parliament, but key provisions have not yet been commenced. We intend to actively monitor how the situation develops. Our view is that the current legal aid system can provide appropriate cover as things stand. If further provisions are commenced, and we are aware of the detail of any Scottish Government regulations, we will review the policy.
11. With regards to children's A&A/ABWOR, our position is that there are no issues raised which suggest a need for immediate change to our policies. However, we note that amending how we approach children's fresh applications has already been raised internally as an important possible option for future reform or simplification work.
12. We will revisit this area should an appropriate opportunity arise. It is important to bear in mind that any changes to the relevant ABWOR provisions would require Scottish Government to change the relevant Regulations, and that therefore, SLAB cannot deliver change in this area alone.

Equalities impact

13. One response included a focus on how we consider the equalities implications of our policies and how specific groups are ostensibly affected (for example, with regards to requirements around financial verification), as well as raising concerns about our processes around **equality impact assessments (EqIAs)**.

14. We note that the s23 agreement with the EHRC mentioned in the consultation response has now been concluded, and that we are confident that our processes for EqlAs are robust.
15. Our approach towards EqlAs is reflected both generally on our [Equalities and Diversity webpage](#) and more specifically in the range of published EqlAs (available at the link above) that have been produced as part of the GALA project.
16. Relatedly, on the various points made concerning accessibility barriers for particular groups - relating to for example, verification and signatures, the relevant EqlAs which are due to be published imminently (for example, on valid grants of A&A) do not raise any particular problems which suggest the policies need to be urgently amended. Again, we will note the issues raised to further consider when these policies are reviewed in full in the future.

Other issues

17. Several other discrete issues were highlighted across the consultation responses. These included how the Care-Experienced Student Bursary is treated for the purposes of financial assessment; the appropriateness of means assessment for certain categories of applicant (for example, survivors of gender-based violence seeking protective orders); and the proportionality of current rules around verification and documentation.
18. In terms of how the Care-Experienced Student Bursary is treated for the purposes of financial assessment, we acknowledge that further clarity would be helpful on this point. We intend to produce clearer guidance on this issue.
19. On the specific point regarding means assessment in the context of advice for survivors of gender-based violence, we note this is a statutory requirement which is not our decision to change, but rather an issue for Scottish Government to consider.

Access to justice

20. Finally, in broad terms it also suggested that there are a range of issues with access to justice and supply of legal advice, such as difficulties in accessing specialist advice or advice in remote rural areas, that SLAB should address.
21. In relation to the various points concerning access to justice and the supply of legal advice, we acknowledge the concerns raised, which reflect wider issues affecting the legal profession. However, it is important to note that there are other, existing forums in which these issues are already being considered, such as the Payment Panel and Working Group on the Future of the Legal Profession.
22. Our view is that we do not hold the tools that would be required to resolve some of the broad concerns which have been raised: it is important to bear in mind the distinction between our powers, functions and responsibilities and those of Scottish Government.

Contact us, feedback and queries

23. In terms of ensuring we stay up to date with how our policies on A&A and ABWOR are experienced, we look forward to undertaking further external engagement in future and welcome any feedback on the operation of this policy.
24. If you have any questions about this consultation, or more broadly on our policies on A&A or ABWOR, please contact consultations@slab.org.uk.

Appendix: collated responses to consultation

Respondent One: JustRight Scotland LLP - Jen Ang

Question 1

What are your views on the current operation of the A&A/ABWOR regime?

a: Are there any areas which are particularly problematic, and if so, why? Do you have any evidence of any adverse impacts of our assessment processes/policies in these areas?

Response: See our response at Question 3.

b: Are there any areas which work particularly well/smoothly?

Response: N/A.

Question 2

Are there any specific changes you would propose to the operation of A&A/ABWOR, including with regards to financial assessment? (Please let us know if you are referring to a specific aid type - for example civil, criminal - or making a general observation.)

Response: See our response at Question 3.

Question 3

Do you have any evidence or experience which suggests that any of our policies/practices in this area may impact negatively on particular equality groups or care-experienced young people?

Response: The stated aim of this consultation is to “gain insight into any concerns [practitioners] have with our current practices (including any unanticipated consequences of our policies) as well as changes that we could consider in future... We are also seeking to find out what you can tell us about any possible impacts for equality groups which we ought to be consideration.”

Access to Justice

Our key concern has been and remains our concern that the Scottish Government’s approach the administration of the Scottish legal aid system does not meet our international legal obligations with reference either to the need to safeguard access to justice nor the right to an effective remedy.

The right to an effective remedy is enshrined both in the International Covenant on Civil and Political Rights (ICCPR), as well as the European Convention of Human Rights (ECHR), and other regional human rights treaties. Further, the UN Declaration of the High-level Meeting on the Rule of Law (A/RES/67/1) adopted in 2012 committed Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid [para. 12 and 14].

We have recently [highlighted our concerns with respect to access to justice and the right to effective remedy](#) for people in Scotland in a series of blog posts linked to our October 2023 response to the Scottish Government’s consultation on the Scottish Human Rights Bill, as well as in our contribution to this Nov 2023 joint Scottish civil society report on "[Making Human Rights Justice a Reality](#)" which includes 13 high-level calls including, “ensure effective remedies for human rights breaches” and “introduce radical reform of legal aid.”

Legal aid remains an essential element of access to justice, and without measures to effectively address the lack of affordable legal advice and representation, people will be denied access to justice.

Equality and Intersectional Barriers to Accessing Legal Advice

We note that in Summer 2021, [SLAB reached a legal agreement with the Equality and Human Rights Commission \(EHRC\)](#) committing to improve its approach to meeting its public sector equality duties, following concerns raised by the EHRC that SLAB was not always sufficiently assessing the impact of its policies on different groups covered under the Equality Act.

It is unclear to us whether SLAB has made progress since reaching that agreement in improving its approach to assessing the equality impacts of its policies, and we are particularly keen to know if SLAB has developed specific plans for ensuring the availability of legally aided advice and representation for individuals and communities of people with protected characteristics.

We are also concerned about the continued lack of transparency on the part of the Scottish Legal Aid Board in terms of how it meets its Public Sector Equality Duties, in particular with reference to the administration of the funding within its powers, and more specifically, how it gathers gendered and intersectional data and assesses the impact of its current policies and processes for groups of people with protected characteristics.

We continue to see significant gaps in legal advice for specialist areas of law in which we work, and advice deserts in many areas of Scotland across a range of legal specialisms. We would like to better understand how SLAB monitors and assesses the impact of its work, taking into account intersectional barriers people and communities face, and how SLAB determines whether specialist legal aid A&A and ABWOR is available and accessible for people on an equal footing across Scotland, whoever they are, and wherever they live.

By way of illustration, we offer the following case studies drawn from our legal practice which highlight the unequal impacts in access to legal aid for groups of people with protected characteristics, or who are marginalised, disadvantaged and excluded:

- **Care Experienced Children and Young People - Treatment of the Care Experienced Student Bursary**
Care experienced children and young people in Scotland receive the Care Experienced Student Bursary. The online system states that we should enter bursaries into the income boxes. This gives the impression that it counts towards income for eligibility (either making someone not eligible or stating a contribution is due). On a recent application, our solicitor did this and then asked that it be discounted. Someone in SLAB then designated the CESB as a non-passport benefit. It would be helpful to get clarity which expressly discounts the CESB and the online system advises us of this. We also wish to highlight that SLAB is a corporate parent under Sch 4 of the Children and Young People (Sc) Act 2014 to care experienced children and young people.
- **Non-Native English Speakers (Migrants, Nationality, Race) - Interpretation Fee Policy**
On the impact of the [SLAB interpreting rates policy](#), we wish to raise the following points:
 - a) Below Market Interpreting Rates - The rate for interpreting is £30 + VAT per hour. This rate has not risen in the last 10 years or so, at the least. In order to ensure safety, confidentiality and professionalism, many practitioners use interpreting agencies (Voiceover, Global Languages etc.) and will not conduct business relying on a family member or friend of a client as interpreter. Due to the cost of living crisis, professional interpreting agencies have raised their prices beyond SLAB rates - it is therefore now almost impossible to book an agency interpreter for face-to-face interpretation at SLAB rates. For example, Voiceover will provide video interpreters at SLAB rates, but not face-to-face interpreters. This means

we must use video interpreters, which impacts our ability to engage with clients. A good face-to-face interpreter is important, particularly to provide person-centred and trauma-informed service to exceptionally vulnerable clients like victims of trafficking, children, and women affected by violence. The alternative, which many in the immigration sector have turned to, is to use independent interpreters. They are not professionally regulated (see, for example, the [risks outlined here](#)), and there can be challenges with working with vulnerable people (e.g., they are not PVG certified). We have already raised this issue with SLAB directly and requested a rate increase to allow us to continue to use agency interpreters face-to-face, but this request has been refused by SLAB as a matter of policy. The impacts for our clients are that we must either (a) use video interpreters and risk detriment to our client; (b) use agency interpreters face-to-face and pay minimum £5/hour out of pocket, amounting to thousands per year - which we as a charity obviously cannot do; or (c) turn to the unregulated self-employed interpreter industry. Legal aid users in Scotland who do not speak English fluently are at a substantial disadvantage, therefore, due directly to SLAB policy on interpreting fees.

b) 24-Hour Cancellation Policy - SLAB policy on cancellations of interpreters within 24 hours only pays for the first hour of an interpretation booking. Interpreting agencies charge the entire period booked (e.g., 2 hours). This means that we lose £35 if we book an interpreter for 2 hours and the meeting gets cancelled. This is a very heavy penalty for legal aid firms - particularly for our charity - where margins are so small, and working in a sector where clients experiencing ongoing trauma and abuse, struggling with destitution, and living chaotic lifestyles are likely to cancel appointments unilaterally a fixed proportion of the time. This SLAB policy is another reason why firms will divert away from legal aid work in immigration.

- **Impact of Illegal Migration Act (Migrants, Nationality)**

We have separately raised directly with SLAB a concern about the [likely impact of the Illegal Migration Act](#) on future asylum and immigration legal aid practice. We have previously highlighted the high-volume administration required in SLAB cases in immigration work. Practitioners are already struggling to engage appropriately within our legal regulatory requirements with asylum seeking clients dispersed across Scotland in hotels, some of whom are now sharing rooms. A minimum of five files per case will need to be raised per client should the full force of the Illegal Migration Act come into effect in Scotland, and every file need to be signed.

We urge SLAB to urgently consider designing and implementing a simplified, fast-track approach to granted A&A and ABWOR for immigration legal aid files should the provisions of the Illegal Migration Act enter fully into force.

- **Women and Girl Victim/Survivors of Gender-Based Violence - Protective Orders**

Our Scottish Women's Rights Centre (SWRC) has [raised concerns about barriers to accessing legal aid](#) faced by women seeking [protective orders](#) for some time.

Most recently this issue came to the forefront again for the SWRC through our legal representation work, during the lockdown resulting from the COVID-19 pandemic.

Many victim/survivors continue to encounter financial barriers when seeking protection from abuse. We are aware from our experience of women contacting our outreach services, that

many women in desperate need of a protective order will be unable to raise a court action if they do not qualify for legal aid and additionally may choose not to pursue such an action if they require to pay a contribution.

Current civil legal aid provisions have made protective orders inaccessible for some victim/survivors of abuse, leading to an imbalance between the access to justice afforded to the perpetrator and that available to the victim. This is unacceptable in a society which states that it will not tolerate domestic abuse and has made significant commitments to eradicate all forms of violence against women and girls.

We have stated previously that we believe it is unfair to ask a victim/survivor to pay for legal advice in order to secure their own protection from harm and abuse - we would advocate the introduction of a non-means tested approach to funding, as used, for example in Adults with Incapacity cases.

- **Travellers / Young People in Crisis / Homeless People / Undocumented Migrants - Streamlining Application Procedures**

Our Scottish Just Law Centre (SJLC) recently took a travellers' rights case, where the number of forms, statements, declarations and documentary evidence required to submit a legal aid application caused significant delay to the detriment of the case.

Many individuals from Gypsy/Traveller communities will not have good internet access and may not use email or online meeting platforms, making communication challenging. The paucity of specialist legal advice regarding matters affecting people in Gypsy/Traveller communities means they or their solicitors may have to travel significant distances to have in person meetings. Completion of forms, providing copies of documentation such as bank statements, and even locating personal data such as National Insurance Numbers can be very challenging, placing them at further disadvantage in accessing justice.

Our observation from legal practice across a number of cases is that this issue can also arise for many different types of clients, who might not have access to their identity documents for various reasons - but who are also invariably additionally vulnerable and at risk of harm or exploitation as a result. We have seen this challenge arise for young people in crisis who have experience relationship breakdown with their families, for people who have become street homeless and who frequently find their identity documents to be stolen or lost, for people from other minoritised communities including Roma, and for undocumented migrants.

We urge SLAB to streamline its processes, minimise forms, signatures, statements and documentation required.

Summary

In all these cases, we would urge SLAB to proactively consider the impact of its rigid policies on the information required for A&A / ABWOR / Civil Legal Aid as potentially raising an unjustifiably high barrier for certain groups of people with protected characteristics, or as a breach of rights for certain marginalised, disadvantaged and excluded groups.

If SLAB colleagues are of the view that some of the matters could be resolved through publication of guidance and policy that allows for wider discretion to be applied to prevent unequal and unfair impacts, we would welcome seeing that done in early course. In conclusion, we ask not just for practical solutions to some key problems we have highlighted above, but are

also seeking leadership from SLAB in delivering a gendered and intersectional analysis of the impact of SLAB A&A / ABWOR and Civil Legal Aid policies for people seeking access to justice across Scotland.

Question 4:

Is there anything else you would like to tell us about with regards to our policies in this area?

Response: N/A.

Respondent Two: Solicitor (Anonymous)

Question 1

What are your views on the current operation of the A&A/ABWOR regime?

a: Are there any areas which are particularly problematic, and if so, why? Do you have any evidence of any adverse impacts of our assessment processes/policies in these areas?

Response: Children's AA is problematic. Different grants of AA cover are required throughout the case. If a child is removed by the granting of a child protection order that is your first grant, then another grant is needed for the second day hearing and a third grant for the 8th working day hearing. This is all within the space of normal 8 days. Each time you have to complete of new and if the client has more than 1 child all the names and dates of birth have to be retyped. This takes time for which we are not remunerated.

ABWOR is of course available but subject to SLAB approval for attendance at hearings. Unlike criminal practitioners who can meet a client and tender a plea and claim a block fee for perhaps 30 mins work, we are required to prepare time and line accounts, justify how many pages we are reading etc More often than not we are concerned with the removal of children from the care of a parent, and it is the start of proceedings that have lifelong consequences. Proper remuneration for this is not being given.

b: Are there any areas which work particularly well/smoothly?

Response: N/A.

Question 2

Are there any specific changes you would propose to the operation of A&A/ABWOR, including with regards to financial assessment? (Please let us know if you are referring to a specific aid type - for example civil, criminal - or making a general observation.)

Response: Consideration of block fees for children's ABWOR at a level consistent with that of criminal cases which are often of lesser consequences.

In civil cases where a recovery has been made, an option should be available to charge the client a private fee a put in a nil claim on the AA certificate rather than having at present to tell clients that firms will not take on this work on legal aid basis, even when it would be appropriate for AA cover to be sought to assess what the case may be worth.

Question 3

Do you have any evidence or experience which suggests that any of our policies/practices in this area may impact negatively on particular equality groups or care-experienced young people?

Response: Fewer solicitors are willing to take on children's panel work due to the lack of remuneration. This can result in lifelong repercussions. Challenging social work views as to whether a child needs compulsory care should be seen as a vital resource.

I have recently successfully opposed the establishment of a grounds of referral for lack of care. A single mother who was having a child with known health issues was persuaded to grant a s25 agreement at birth. Her contact was gradually reduced, and she was told by social work she had to work with them and there was no need for a solicitor. After over 6 months by which time her contact was reduced to fortnightly, she sought legal advice. We revoked the s25 and the social work department sought and were granted a CPO on basis mum had never had the child in her care. Social work were not independent. At proof, by which time the child was 18 months old the sheriff found that the grounds were not established and that the social work initial decisions were not made on the basis of the full information available. AA was essential in this case, however had we been able to obtain independent reports at an earlier stage the delay may have been avoided and the child may have been able to return home earlier. In children's proceedings we are repeatedly told if independent reports are needed then the panel should order then as a result of which SCRA will pay.

Frequently for children's matters the clients have learning difficulties, mental health issues and literacy problems. The law is complicated and given panels are lay volunteers, solicitors need to be present to address the imbalance that often exists.

Question 4:

Is there anything else you would like to tell us about with regards to our policies in this area?

Response: N/A.

Respondent Three: Solicitor (Anonymous)

Question 1

What are your views on the current operation of the A&A/ABWOR regime?

a: Are there any areas which are particularly problematic, and if so, why? Do you have any evidence of any adverse impacts of our assessment processes/policies in these areas?

Response: One of the main issues is trying to obtain financial verification of income and capital. Despite advising clients that they need to bring an up to date bank statement (i.e. no more than 7 days' old) for all accounts they have to a first appointment the majority of clients find themselves unable to do this. A number of them hold accounts with banks who no longer have local branches, or they only receive statements quarterly. This delay matters. If some other method of checking capital could be used that would be helpful.

The mandate used to contain a nil capital declaration but no longer does so - can that be put in the forms in the future again?

Generation of form 2 link does not always work, and it does not seem possible to use the electronic form 2 unless it is in at the outset.

Another issue is potential recovery, particularly when clients simply stop instructing us. We often do not know if anything has been recovered. If there is recovery the items are frequently domestic or personal and of little cash value. The risk of not being paid means solicitors are reluctant to handle work where clawback may be an issue.

b: Are there any areas which work particularly well/smoothly?

Response: Applying for template increases.

Question 2

Are there any specific changes you would propose to the operation of A&A/ABWOR, including with regards to financial assessment? (Please let us know if you are referring to a specific aid type - for example civil, criminal - or making a general observation.)

Response: As above - One of the main issues is trying to obtain financial verification of income and capital. Despite advising clients that they need to bring an up to date bank statement (i.e. no more than 7 days' old) for all accounts they have to a first appointment the majority of clients find themselves unable to do this. A number of them hold accounts with banks who no longer have local branches, or they only receive statements quarterly. This delay matters. If some other method of checking capital could be used that would be helpful.

The form 2 link does not seem to work well.

Question 3

Do you have any evidence or experience which suggests that any of our policies/practices in this area may impact negatively on particular equality groups or care-experienced young people?

Response: Those adversely affected are those who are just above the eligibility for LAA of all types but cannot afford to pay private fees. They are stuck in limbo and cannot get representation.

Question 4:

Is there anything else you would like to tell us about with regards to our policies in this area?

Response: Many solicitors do not do financial cases on legal aid because of the low fees. This is creating an advice desert