

Procedure for Consideration of Exclusion of Solicitor or Advocate under Section 31 of Legal Aid (Scotland) Act 1986

Preliminary

1. This document details the procedure which the Scottish Legal Aid Board (SLAB) will follow in determining whether to exclude a solicitor or advocate under Section 31 of the Legal Aid (Scotland) Act 1986 and is hereinafter referred to as “this Procedure”.
2. This procedure is in accordance with, and sits within, SLAB’s wider statutory powers, functions, duties and obligations, and nothing arising from, ascertained through or undertaken as part of steps taken under this Procedure limits or restricts the competent exercise of such other powers or functions or the fulfilment of such other duties or obligations, as SLAB may have in relation to any matter.

Definitions

3. The following definitions are used in this Procedure:

“the Act” means the Legal Aid (Scotland) Act 1986

“SLAB” means the Scottish Legal Aid Board

“Compliance manager” means the manager of the Compliance Department of the Scottish Legal Aid Board or such other member of staff of SLAB acting in that capacity for the purposes of this Procedure.

“Equalities groups” means persons for whom statute provides protection against discrimination on the grounds of protected characteristics

“Relevant conduct” means the conduct of a solicitor or counsel when acting or selected to act for the persons to whom legal aid or advice and assistance is made available; their professional conduct generally; and in the case of a member of a firm of solicitors or a director of an incorporated practice, such conduct on the part of any person who is for the time being a member of the firm or director of the practice.

“Respondent” means the solicitor or advocate in respect of whom proceedings for exclusion under Section 31 of the Act are contemplated or initiated under this Procedure

“Section 31 Committee” means a committee of not less than four members established by SLAB for the purposes of determining proceedings under Section 31 of the Act in accordance with this Procedure. The Section 31 Committee (in this paragraph hereafter referred to as the “Committee”) shall comprise of (a) the Chairman of SLAB, who will chair the Committee, (b) the Chief Executive of SLAB and (c), and at least two other members selected by the Chairman from the membership of SLAB. The Committee may co-opt such further persons as members as it considers appropriate from time to time. In the event that the Chairman, Chief Executive or any other selected members of the Committee is unable to attend a meeting of the Committee, further members of the Committee can be

drawn from membership of SLAB or co-opted. A quorum of the Committee shall be four members. If the Chairman is not in attendance for a meeting of the Committee, that meeting will be chaired by a Committee member nominated in advance by the Chairman or otherwise agreed by the attending members for that meeting. Where the Respondent is a solicitor, at least one of SLAB members sitting should include a member who is, or has in the past practised as, a solicitor. Where the Respondent is an advocate, at least one of SLAB members sitting should include a member who is, or has in the past been a member of the Faculty of Advocates. SLAB has authorised the Committee constituted under this Procedure to determine any decision to exclude a solicitor or advocate under section 31 of the Act on its behalf. Senior members of Board staff may attend Committee meetings of any nature as the Chairman or other Committee chair directs.

“Clerk to the Section 31 Committee” (and thereafter referred to as the “clerk”) means the member of SLAB’s administrative staff from time to time nominated to undertake such administrative work as is required to facilitate the effective operation of the business of Section 31 Committee.

“Meeting of Directors” means a meeting of not less than two directors of SLAB constituted for the purposes detailed in paragraphs 5 and 10 - 13 of this procedure. Any decision of a Meeting of Directors shall be by simple majority, except where only two directors are in attendance, when unanimity is required.

Equalities

4. SLAB seeks to ensure that this Procedure operates with full regard to the interests and requirements of all equalities groups. SLAB shall take such steps and make such adjustments as are reasonable or otherwise required or appropriate, and all parts of this Procedure may be subject to such steps or adjustments as accords. SLAB encourages notification of any relevant requirements or issues that arise for any person involved with the operation of this Procedure.

Initial Investigation and the Decision to Initiate Proceedings

5. Where the Compliance Manager considers that there may be good reason for believing a solicitor or advocate has exhibited relevant conduct which may make it appropriate for SLAB to consider excluding that solicitor or advocate either from being selected by a person to whom legal aid or advice and assistance is made available to advise or act for them, or from giving advice and assistance to or acting for a person to whom legal aid is made available, he or she shall prepare a Report (hereinafter known as the “Section 31 Report”). Having done so the Compliance Manager shall submit the Section 31 Report to a Meeting of Directors of SLAB constituted for the purpose of considering the Section 31 Report and determining whether proceedings to consider exclusion of the Respondent should proceed in accordance with this Procedure.
6. If it is determined by directors at the Meeting of Directors in terms of paragraph 5 that no proceedings should take place at that time, any matters arising in the Section 31 Report or such other facts and circumstances as exist at that time, whether known to SLAB or not, may still be referred to or founded upon as accords in any subsequent proceedings under this Procedure.

Initiation of Proceedings

7. Where it is determined in terms of paragraph 5 that proceedings should take place, the Compliance Manager shall, by recorded delivery letter, and separately, first class post, give notice to the Respondent to advise him/her that proceedings have commenced to consider his/her exclusion from the provision of legal assistance under Section 31. The said notice should be in accordance with paragraph 9 below, but will not be invalidated by any variation therefrom.
8. Following the issue of the said notice, the Respondent shall submit any representations or response he or she seeks to make, to the Compliance Manager of SLAB, within twenty-one days of the date of posting of the notice, or such other period which may be agreed by SLAB on cause shown, provided that agreement to such further period is achieved within the initial period of twenty-one days. If no representations or response are received, or further period agreed, within the foregoing period the Compliance Manager may proceed under this procedure on the basis that the Respondent does not intend to make representations. SLAB may on special cause shown exercise discretion to allow late representations or response at any time prior to the First Hearing in the referral.
9. The notice issued by the Compliance Manager under paragraph 7:
 - (a) shall contain or have attached:
 - (i) A copy of this Procedure;
 - (ii) A statement of the grounds upon which exclusion is proposed including a statement or summary of the principal facts which support those grounds (the “Statement of Facts”);
 - (iii) A copy of the Section 31 Report.
 - (b) shall advise the Respondent:
 - (i) That the procedure may result in exclusion from the provision of legal assistance in terms of Section 31(3), and the consequences of exclusion under Section 31;
 - (ii) That the timescale for any relevant representations or response in connection with the grounds, the facts supporting same, or against the possibility of exclusion, or otherwise, is that they are to be submitted to SLAB within 21 days, or such other period to which consent may be given on cause shown, provided that consent to such further period is agreed within the initial period of 21 days; and that on special cause shown SLAB may exercise discretion to allow late representations beyond the foregoing period if received prior to the First Hearing;
 - (iii) That if the Respondent disputes any of the Statement of Facts, and wishes to challenge these, written Answers to the Statement of Facts specifying those matters that are admitted, denied or not known, etc. must be lodged as part of any representations;
 - (iv) That on expiry of the relevant period per the foregoing paragraph 8, and any preliminary consideration of the response, that SLAB, where it intends to proceed under this procedure, will fix a meeting of the Section 31 Committee, known as a First Hearing, to consider the

Section 31 Report of the Compliance Manager and any representations or response received, and to assess and determine the appropriate further procedure, or where circumstances permit, determine the issue;

- (v)
 - 1) Of the potential availability of an Oral Hearing if (a) requested by the Respondent and the Section 31 Committee do not consider such a hearing to be unnecessary or (b) where the Section 31 Committee considers that there is a clearly identified justification for such a hearing under reference to the terms of written representations submitted by the Respondent, the nature of any factual dispute, any complexity identified or otherwise; and
 - 2) that an Oral Hearing will not be assigned unless justified by the written representations or otherwise considered appropriate by the Section 31 Committee;
 - (vi) That the Respondent should have regard for the possibility that an Oral Hearing is thereafter assigned and ensure that the representations made beforehand in response to the Section 31 procedure notification should include all averments that would be necessary to constitute fair notice of the position that the Respondent would propose to put at such a hearing, and that the Respondent will not be permitted, other than in exceptional circumstances to put any position at an Oral Hearing of which such notice has not been so given;
 - (vii) That in the event of a determination excluding the Respondent, that there is a statutory right of appeal to the Court of Session in terms of Section 31(4) of the Act;
 - (viii) That a finding of exclusion and the reasons therefor may be published by SLAB.
 - (ix) That this procedure is in accordance with, and sits within, SLAB's wider statutory powers, functions, duties and obligations, and nothing arising from, ascertained through or undertaken as part of, steps taken under this Procedure limits or restricts the competent exercise of such other powers or functions or the fulfilment of such other duties or obligations, as SLAB may have in relation to any matter.
- (c) Shall require the Respondent, within 21 days (or such other period agreed as above), to furnish SLAB with:
- (i) any written representations in accordance with the foregoing including:
 - 1) Representations as to whether any factual matters are disputed, and if so, in what respect,
 - 2) Any material that would have a bearing on the Section 31 Committee deliberations as to the merits of the case and as to any disposal;

- (ii) If the Respondent wishes to request an Oral Hearing, identification of what information or matters additional to his/her representations the hearing would address;
 - (iii) If the Respondent disputes material facts narrated in the Statement of Facts, written Answers to the Statement of Facts in which he/she details facts that are admitted, denied, and not known as well as any contrary position that he or she might seek to rely on in due course;
 - (iv) An estimate of the likely duration of the hearing, and particularly, if it is likely to take more than one day, and if evidence is to be taken from witness in relation to disputed facts, the likely number of witnesses;
 - (v) Any address or addresses to which correspondence or formal notifications issued by SLAB to the Respondent in relation to this procedure should be sent.
10. No later than 28 days after expiry of the period of notice or such other period afforded for representations, the Compliance Manager will further refer the Section 31 Report, and any response or representations from the Respondent to a further Meeting of Directors. That Meeting of Directors will consider the material put before it and whether in the light of any representations made or otherwise, there is any basis for not proceeding to refer the matter to the Section 31 Committee.
11. If the Meeting of Directors determines not to refer the matter to the Section 31 Committee the Compliance Manager shall notify the Respondent of this decision, and, that notwithstanding the decision not to proceed at that time, any alleged conduct, facts and circumstances which gave rise to the initial consideration of proceedings may still be referred to or founded on in any other proceedings under this procedure which might be considered appropriate at a later date.
12. If the Meeting of Directors does not make a determination in accordance with paragraph 11 it shall refer the matter to the Section 31 Committee in accordance with paragraph 14 hereof.
13. The Compliance Manager shall report the decision of the Meeting of Directors under paragraph 10 to SLAB.

Referral to a Section 31 Committee

14. Where the Meeting of Directors has referred the matter to the Section 31 Committee in accordance with paragraph 12, the Compliance Manager shall notify the clerk to the Section 31 Committee of the referral within twenty-eight days of the date of the Meeting of Directors. Along with the notification, the Compliance Manager will provide copies of the Report, the notification sent to the Respondent in terms of paragraph 9 hereof, any response or representations received from the Respondent, and any other relevant material (hereinafter referred to as the “relevant papers”).

15. Upon receipt of the notification referred to in the preceding paragraph, the clerk will make arrangements to convene the Section 31 Committee to meet as soon as practicable, and hold the First Hearing prescribed by paragraph 17.
16. The clerk will issue copies of the relevant papers to the Section 31 Committee members prior to the First Hearing date.

First Hearing

17. The First Hearing of the Section 31 Committee shall be held in private. The purpose of the First Hearing is to consider the matter in the light of the relevant papers produced for the hearing, and to determine the appropriate further procedure.
18. At the First Hearing the Section 31 Committee shall consider the Report and any representations, and any request for an Oral Hearing. In the event that the Section 31 Committee considers that it is in a position so to do, it may consider and determine the referral and any ancillary issues at the First Hearing and in the event that the Section 31 Committee establishes that it is appropriate to consider and make:
 - (i) An order excluding the Respondent, it may proceed to dispose of the referral in terms of paragraph 30 hereof.
 - (ii) An order dismissing the referral, it may proceed to dispose of the referral in terms of paragraph 29 hereof.

If the Section 31 Committee considers that for any reason it is not in a position to determine the referral at the First Hearing it may do any one or more of the following:

- (a) Seek further information;
- (b) Consult with any professional or other body;
- (c) Continue or adjourn the hearing (in which event any subsequent hearing which is not an Oral Hearing shall proceed as if it was a First Hearing in accordance with this provision);
- (d) Fix an Oral Hearing;
- (e) Take such other steps as appears appropriate to the proper conduct of proceedings, including such inquiries as are required to identify suitable date or dates for any Oral Hearing and the likely duration, and where evidence may or will require to be heard, the nature and number of witness or nature of other evidence; or
- (f) Without prejudice to the foregoing generality the Section 31 Committee may also order that evidence in chief of any witnesses to be relied upon by the Respondent or the Compliance Manager be taken in the form of a signed written statement from the witness lodged/exchanged no later than such date as the Section 31 Committee directs, and that the attendance of the witness at the Oral Hearing be restricted to the purposes only of cross-examination and re-examination.

19. Where the Section 31 Committee assigns an Oral Hearing the clerk shall contact the Respondent in writing to advise that an Oral Hearing is in process of being assigned and the Respondent will be asked to respond, within fourteen days, with an indication of unsuitable dates. Thereafter the clerk will assign a date or dates for the Oral Hearing, and written notification will be issued to the Respondent.
20. So far as is required for the proper hearing of the case, the referral will be presented by the Compliance Manager or his or her appointed representative.
21. All communications in relation to the referral will be sent to the Respondent, unless the Respondent directs that correspondence be sent or copied to a legal representative.
22. The Respondent must lodge with the clerk, no later than twenty-eight days prior to the date of commencement of the Oral Hearing whether or not an order has been made under paragraph 18(f):
 - (a) A list of names and addresses of any witnesses which he or she intends to lead in evidence at the hearing;
 - (b) An inventory of any productions and documents which he or she intends to refer to or rely on at the hearing, together with the productions and documents referred to therein annexed in order, and six full sets of copies thereof;and at the same time intimate one full copy of any such item(s) to the Compliance Manager.
23. The provisions of foregoing paragraph apply reciprocally to the Compliance Manager.
24. Where an order is made in terms of paragraph 18(f) hereof, the clerk will notify the date when signed witness statements should be lodged and copies exchanged. Thereafter only a witness for whom a signed statement has been produced in accordance with paragraph 18(f) will be permitted to attend, and then only for the purposes therein described. On cause shown, the Section 31 Committee may excuse any failure to comply with an order made under paragraph 18(f) on such terms as it thinks fit, or make such further order as it thinks appropriate.

Oral Hearing

25. The purpose of any Oral Hearing will be to:
 - (a) Seek to determine or resolve any disputed issues;
 - (b) enable clarification of any matter(s) of uncertainty or difficulty;
 - (c) permit matters pertinent to the disposal of the matter to be determined by the Committee; or
 - (d) Take, request or order such other steps as appears appropriate to the proper conduct of the proceedings (including all options available to the Section 31 Committee at the First Hearing, such as continuing or adjourning the hearing, etc.).

so that the Section 31 Committee might properly determine the issues and the referral by establishing whether it is appropriate to consider and make:

- (i) An order excluding the Respondent, in which event the Committee may proceed to dispose of the referral in terms of paragraph 30 hereof; or
- (ii) An order dismissing the referral, in which event the Committee may proceed to dispose of the referral in terms of paragraph 29 hereof.

Only issues or matters fair notice of which has been given previously in the relevant papers will be capable of being canvassed before the Section 31 Committee unless the Chair otherwise determines on cause shown.

26. (a) Any Oral Hearing shall be conducted in such a manner as is appropriate with regard to the facts and circumstances of the case and the nature of the representations received, and otherwise as determined by the chair of the Section 31 Committee.
- (b) Without prejudice to the foregoing generality, the Section 31 Committee, where it is appropriate so to do may hear and determine disputed issues of fact or other aspects of the referral prior to considering remaining aspects of the referral. The Oral Hearing may be continued or adjourned as appropriate to facilitate the foregoing procedure.
- (c) If evidence is required to enable the Section 31 Committee to determine disputed issues of fact, then the normal procedure for taking evidence in summary civil cases will be adopted by the Committee in relation to these issues unless otherwise directed by the Committee, e.g. under paragraph 18(f). Depending on the nature of the Respondent's position, he or she may be invited to lead evidence first.
- (d) If there is no dispute as to material facts, the case may proceed with submissions and supporting material only.
- (e) If, after receiving or hearing the material presented by the Compliance Manager and from the Respondent where submitted, the Section 31 Committee considers that there are further matters or issues which might usefully be addressed to assist the Committee in its deliberations, it may invite either or both parties to present further evidence, material or submissions as the Committee sees fit.
- (f) When the Section 31 Committee has heard all evidence, and/or submissions from the Compliance Manager and from the Respondent it shall consider the material before it and issue a decision either in accordance with either paragraph 29 or paragraph 30 of this Procedure. The Section 31 Committee may issue a decision immediately or may deliberate further in which case a decision will be issued within six weeks of the conclusion of the evidence and submissions. This period may be extended by the Chair where unforeseen circumstances prevent the Committee from reaching and issuing a decision within the said period of six weeks.
27. The Respondent, at his or her option and expense, may be represented by a solicitor, solicitor advocate or counsel at any Oral Hearing. Representation at an Oral Hearing by a person other than in accordance with the foregoing provision will be at the discretion of the Chair.

Decision and Disposal

28. The Section 31 Committee may determine the referral whether at the First Hearing, any continuation or adjournment thereof, an Oral Hearing or any continuation or adjournment thereof.
29. If the Section 31 Committee determines that there is no good reason to make an order under Section 31 excluding the Respondent it shall dismiss the referral. Written notification of the dismissal will be issued to the Respondent within fourteen days of the decision. Written reasons may, but need not, be given. Where a determination is made under this paragraph after the Section 31 Committee has adjourned to consider its decision, but before an adjourned hearing date, the adjourned hearing will be cancelled, and the written notification will include notification of the cancellation of the adjourned hearing.
30. If the Section 31 Committee determines that there is good reason to make an order excluding the Respondent under Section 31, it shall, on behalf of and as authorised by SLAB, make an order excluding the Respondent in terms of Section 31 of the Act which order shall include a determination of the effective date of the exclusion and the duration of the exclusion and any other relevant provision in connection therewith. The Section 31 Committee will also provide written reasons for its decision and direct the Compliance Manager to issue a notice in terms of paragraph 31.
31. Where so directed in terms of paragraph 30 the Compliance Manager will issue, as soon as possible and otherwise within fourteen days of the date of decision, a notice to the Respondent intimating the decision and reasons of the Section 31 Committee. The said notice will be sent to the Respondent's correspondence address, the last known business address and to the Respondent's representative, if any, unless the Respondent specifies an alternative and sufficient form of intimation. The Respondent will be advised of the statutory right to appeal to the Court of Session against SLAB's decision to exclude him or her from involvement in the provision of advice and assistance or legal aid.
32. The notice of the decision will also advise the Respondent:
 - (a) that any professional duties as an officer of court or otherwise to ensure that court diets are covered, continue, and;
 - (b) that his or her legal aid or advice and assistance cases should be transferred to another solicitor or advocate who is able to deal with them, prior to the effective date of exclusion or within fourteen days of the decision if the effective date of exclusion is immediate or within the said fourteen day period.
 - (c) In the event that the effective date of exclusion is not immediate, that SLAB may require reports from the Respondent as to the progress of transfer of, withdrawal from, the provision of legal assistance, and that if SLAB is not satisfied that adequate steps are being taken, that SLAB may take such steps as it thinks fit to protect and promote the best interests of assisted persons, including corresponding with clients in all active or non-concluded legal assistance cases to appraise them of the exclusion and of the requirement to instruct other representation in the event of a wish or need for continued publicly funded legal assistance.

- (d) That SLAB will notify the Law Society of Scotland (where the Respondent is a solicitor) or Faculty of Advocates (where the Respondent is an advocate) of its decision to exclude the Respondent
- (e) That SLAB may publicise the decision to exclude the Respondent and the reasons therefor

Publication and Effect of Decision

33. If no appeal to the Court of Session against SLAB's decision to exclude has been intimated, and after the elapse any such further period as SLAB considers appropriate from the date of notification of SLAB's decision to exclude the Respondent, without prejudice to such further steps as SLAB might take:
- (a) SLAB will notify the Law Society of Scotland (where the Respondent is a solicitor) or Faculty of Advocates (where the Respondent is an advocate) of its decision to exclude the Respondent concerned, and the reasons therefor, irrespective of whether, separately, a complaint or referral has been, or is then, made by SLAB to the Scottish Legal Complaints Commission;
 - (b) SLAB may publicise its decision to exclude the solicitor or counsel from the provision of legal aid or advice and assistance, and the reasons therefor.
34. To ensure the interests of relevant persons are protected, and without prejudice to any steps taken under any other provision of this procedure or otherwise, SLAB may notify all clients in receipt of legal aid or advice and assistance in all active or non-concluded cases of the Respondent (where a solicitor) and instructed agents of the Respondent (where an advocate) of the decision to exclude the Respondent from the provision of legal aid or advice and assistance, or take such other steps as are reasonable and appropriate to protect and promote the interests of assisted persons.