



Law Society  
of Scotland

# Consultation Response

Scottish Legal Aid Board

Consultation on the Interests of Justice Test

12 November 2020



## Introduction

---

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Legal Aid and Criminal Law Committees welcome the opportunity to consider and respond to the Scottish Legal Aid Board (SLAB) consultation on the application of the Interests of Justice (IoJ) test in sheriff court proceedings (the consultation).

We confirm that we are responding to the consultation as an organisation and have no objection to the publication of the response.

We are content for SLAB to contact us again in relation to this consultation exercise.

## General

---

The consultation refers to the administration of criminal legal assistance regarding the application of IoJ test to be applied by SLAB or the relevant solicitor. The consultation considers how this test is and should be applied.

The IoJ test refers to a range of statutory factors set out in section 24 of the Legal Aid (Scotland) Act 1986 where the term is not defined with its application requiring the exercise of discretion by either SLAB (for summary criminal legal aid) or the solicitor (for ABWOR). SLAB's policy is that the IoJ test is satisfied 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.

We are fully in support of the simplification and streamlining of the application process for summary criminal legal assistance and ABWOR. We understand too given the absence of any legislative opportunity that it is important that this change can be effected within the existing statutory legal aid framework.

With the commencement of the COVID-19 pandemic, it is more important than ever to reduce the necessity for contact and administrative processes that are involved in satisfying the IoJ test. We agree that this change if implemented could result in speeding up the application process so that the only issue to satisfy the grant of legal aid should relate to assessment of means through financial eligibility.

## Consultation Questions

---

### Question 1: Which option do you favour SLAB adopting?

Option 1 – No Change

#### **Option A - Interests of justice satisfied solely on the basis of prosecution in the sheriff court**

Option B – As option A but current policy retained for areas with no separate JP court.

We support the Option A out of the three options provided. We do not support No Change for the reasons specified above 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<sup>1</sup> which do not have a JP courts would require to satisfy the lofJ 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?

If the consultation results in the removal of the lofJ 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

<sup>1</sup> Kirkwall, Lerwick, Lochmaddy, Portree, Stornoway, and Wick

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"<sup>2</sup> 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?**

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<sup>3</sup> 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?**

No comment.

<sup>2</sup> <https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/>

<sup>3</sup> [https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Prosecution20Code20\\_Final20180412\\_\\_1.pdf](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf)

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

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 IofJ test. Similarly, it should be more straight forward 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.

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

We refer to our comments above regarding the impact of the COVID-19 pandemic. There is benefit in the reduction of paperwork by removing the IofJ test and consequentially, the time spent in needing to establish the grant of summary criminal legal aid and ABWOR.

**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?**

Any response which we could give would merely be anecdotal.

**For further information, please contact:**

Gillian Mawdsley

Policy Executive

Law Society of Scotland

[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)