



Scottish Legal
Aid Board

Consultation on Advice
and Assistance (A&A)
and ABWOR
September 2023

The Scottish Legal Aid Board

www.slab.org.uk

Overview

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 advice and assistance (A&A) and assistance by way of representation (ABWOR) across all three aid types (civil, criminal and children's legal assistance).
2. As part of our programme of reviewing all our operational policies, we are now seeking input from solicitors and other stakeholders on their experiences of engaging with our policies on the provision of A&A and ABWOR. Many of the decisions taken in relation to A&A and ABWOR rest with the solicitor, rather than SLAB: however, as a responsible public body, we nonetheless have an important role in checking that a solicitor has properly applied any relevant tests, to ensure that the requirements of the regulations are being met. Our policies and guidance in this area therefore remain important.
3. This consultation does not present any specific proposals for changes to our policies on A&A/ABWOR at this stage. Our aim in launching this consultation is to use this as an opportunity gain insights which could inform consideration of changes that stakeholders wish to see. Separately, we are also consulting on a number of specific areas within the broad ambit of A&A/ABWOR in which we are either proposing changes to our policy or where we anticipate changes in future.
4. This consultation is a step towards a modern, user-focussed legal aid service. We are developing statements of policy for all the decisions we take, as well as how we approach our role where solicitors take decisions. Those policies will provide a foundation for guidance for the profession. Once we have completed this consultation, we will finalise and publish guidance for those involved in the provision of A&A or ABWOR, as well as separate guidance for our assessment staff.



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Why are we consulting?

5. We are seeking your input on how our current policies on the provision of A&A and ABWOR are working, and in particular, whether there are any problems or risks we should consider as we review our policies. We are also keen to hear about any particular issues or impacts for applicants with protected characteristics. Your input is important to us in reviewing and developing our policies and ensuring we take into account as much relevant information as possible from a range of viewpoints.
6. Through the GALA project, we are currently working our way through all our policies and guidance on legal aid (including A&A and ABWOR) to develop a refreshed framework which supports our staff in making decisions and - in the specific context of A&A/ABWOR - provides assistance to solicitors in understanding our role and approach to those areas in which they are responsible for making the decisions.
7. The decision-making guidance and policy statement outputs from this project are published on the GALA website as we complete the development process for each policy. The existing legal aid guidance on the main SLAB website will also be reviewed and amended as required.
8. This project will help us:
 - Set out clearly where the statutory framework gives us and solicitors discretion in any aspect of legal aid/A&A decision-making
 - Clearly state our policies for applying this discretion in all the decisions we make, including where our role is to check where solicitors have properly applied a test;
 - Train our staff applying these policies, with guidance written specifically for decision-making
 - Clearly communicate with the profession and others about our decision-making, thereby improving our accountability for our policies and decision-making
 - Make plain what information we require from solicitors and advocates to take a final decision first time.
9. In some areas we are setting down our current policy and will review it in due course. Other areas are subject to in depth review, to consider what changes might be possible within our current statutory framework that might simplify the system (for instance, our recent work on Accounts assessment). For most of A&A/ABWOR, we are simply setting down what we currently do. Nonetheless, we are keen to hear others' experiences of the system and suggestions for any changes to how we approach A&A/ABWOR which would be within our legislative competence.

10. More information about the GALA project can be found on our website.¹

Expected outcomes of this consultation

1. Inform and contribute to our ongoing review of operational decision-making policies in these areas.
2. Provide additional evidence on equalities issues for consideration as part of impact assessment.

Background to SLAB

11. 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, and - where solicitors are responsible for taking decisions - to perform a checking and validation role. You can find out more about what we do on our website.²

12. 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. Where the legislation enables solicitors to make decisions, there may also be a degree of discretion given there: the exercise of such discretion may or will be bounded, and SLAB's role will be to check the decision is within bounds.

Background to A&A and ABWOR

13. In broad terms, advice and assistance is oral or written advice on a matter of Scots law provided by a solicitor to their client, as defined by Section 6 of the Legal Aid (Scotland) Act 1986. It can be given on any matter which can be considered a matter of Scots law. It is a form of legal assistance which can be used for legal advice and for other assistance short of representation.

14. A&A does not cover representation. ABWOR (Assistance By Way Of Representation) is the form of legal assistance which is potentially available for representation. However ABWOR is only available for specifically prescribed court and tribunal situations, as well as certain Children's Hearing proceedings.

15. There are a number of eligibility criteria - including financial eligibility provisions in some (though not all) cases - which the solicitor must satisfy

¹ <https://www.slab.org.uk/news/legal-aid-framework-project-publishes-first-policies-and-decision-makers-guidance/>

² <https://www.slab.org.uk/corporate-information/what-we-do/>

themselves on prior to providing A&A. Certain forms of work - e.g. some types of ABWOR - are also subject to a merits test which is to be applied by the solicitor, and in other circumstances by SLAB.

16. Considering that A&A and ABWOR are available across three aid types, it is important to bear in mind that these forms of legal assistance need to cover a very wide range of subject matters and types of proceedings. In financial terms, combined expenditure from the Fund on A&A and ABWOR in the most recent year was nearly £34 million. In terms of volumes, our 2022/23 Annual Report provided the following data:

	N. grants	Fund expenditure (£m)
Civil A&A/ABWOR	43,600	£20.4
Criminal A&A/ABWOR	41,100	£10.9
Children's A&A/ABWOR	6,700	£2.4
Total	91,400	£33.7

The statutory framework for A&A/ABWOR

17. In contrast to legal aid applications, for A&A, the solicitor (rather than SLAB) is responsible for determining whether that the applicant is eligible to receive A&A, and for granting the application if so. However, where the solicitor is responsible for making the decision, we nonetheless have a duty to check that they have properly satisfied themselves as to eligibility etc. in line with the relevant Regulations.
18. However, we are also responsible for directly taking the decisions in a number of other areas of A&A/ABWOR: for example, on requests for increases, and in applying a merits test to enable ABWOR to be provided in certain forms of proceedings.
19. In a number of areas, solicitors granting applications (and SLAB in checking) may have discretion in how decisions are to be made: for instance, where the regulations specify a test, but not how it is to be applied. Clear policy and guidance are therefore important to assist consistency and transparency in these areas. Notwithstanding their responsibility in making decisions, we appreciate that solicitors themselves may also look to our guidance for direction in how to approach this role.
20. Given the scope of A&A and ABWOR, and in the interests of brevity, we are relying on a degree of prior knowledge as to these processes for the purposes of this consultation. However, as a prompt for consideration, please see below for

a basic overview of what we consider to be the key policy blocks in this context.

- **Establishing of client eligibility:**
 - Whether the client wishes to instruct the solicitor, and whether the client may receive A&A;
 - Whether A&A can be given to a person on behalf of another;
 - The matter of Scots law test;
 - The identification of distinct matters and how multiple matters are to be dealt with;
 - Merits tests (where applicable);
 - Boundary between A&A and ABWOR.
- **Financial eligibility**
- **Grant management:**
 - Increases in authorised expenditure (including templates);
 - When fresh grants of advice and assistance are required;
 - The giving of advice on the same matter;
 - Changes in solicitor.

21. Clearly, the stages above are not exhaustive, but may provide an idea of the basic structure of A&A/ABWOR and the key decision points within them.

22. For those who wish to review our current guidance in these areas or learn more about A&A and ABWOR, please see our published guidance.³

Scope of the consultation

23. As noted above, the range of policies and processes that fall under the broad headings 'A&A' and 'ABWOR' are wide, encompassing a number of steps, tests and checks at different stages of a case. Similarly, AA and ABWOR are available for a very broad range of subject matters, across three aid types. As such, the scope of this consultation is potentially extremely large.

24. We are keen to gather information covering a broad spectrum of experience, subject matters, case types etc., across the different elements of the

³ <https://www.slab.org.uk/solicitors/legal-aid-guidance/>

AA/ABWOR regime. However, there are a number of policy areas which fall outwith the scope of this consultation.

25. **Our policies on legal aid.** This consultation is focussed on A&A/ABWOR only, and as such, our policies on legal aid are not relevant here.

26. **Our policies on payment for work done/Accounts assessment.** Our policies on ‘end of grant’ matters - such as Accounts assessment - are not being considered in this tranche of work. We consulted recently on our Accounts policies, and have developed and published policy and decision-makers guidance in these areas. As such, Accounts assessment is not within the scope of this consultation.

27. **Our policies on clawback.**

28. **Our policy on the interests of justice test applied in summary criminal ABWOR cases.** We have already consulted on and finalised our policy in this area.

29. We are also consulting separately on the following specific area:

- The criminal ABWOR merits test we apply in **removal of driving disqualification cases.**

30. If you are interested in responding to that specific consultation, you can find detail in the [consultation document](#).

Responding to this consultation

31. 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.

32. 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.

33. We look forward to receiving your views on these issues.

Deadline

34. Consultation on the proposed changes runs for a six-week period from 25 September. Please ensure any responses are submitted to us by 5pm on the **6 November 2023**.

How to respond

Online

35. You can respond using our [online Consultation Questionnaire](#).



By email

36. If you wish to respond by email, please complete the [Word version of the Consultation Questionnaire](#).

37. Completed questionnaires should be emailed to: consultations@slab.org.uk

Enquiries: If you have a query about the consultation process, please contact consultations@slab.org.uk