



Scottish Legal
Aid Board

Consultation on SLAB's
approach to prior
approval for ABWOR:
removal of driving
disqualification cases

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 criminal advice and assistance (A&A) and assistance by way of representation (ABWOR). In order to provide ABWOR, in certain types of case solicitors must firstly request and receive our approval. We are now consulting on how we might change our approach to these types of approvals in one specific area: criminal ABWOR for the removal of a driving disqualification.
2. We currently set out the test which we apply in these cases within our [published guidance](#). This consultation presents a proposal for revising our policy in this area, by changing the test we apply, and accordingly the amount and types of information that must be provided to us by solicitors.
3. Our aim in exploring our policy in this area is to ensure our approach to prior approval is as proportionate as possible, while continuing to meet our obligation to ensure that all funded cases meet the statutory tests. The change on which we are consulting is therefore aligned with the Legal Aid Review's strategic aim of maintaining scope but simplifying.¹
4. We are also undertaking an equalities impact assessment of both the current approach and the proposed change, and seek evidence to support that assessment as part of this consultation.
5. This consultation is a step towards a more modern, user focused and transparent legal aid service. We are developing statements of policy for all the decisions we take, and those policies will provide a foundation for refreshed guidance to be used by staff, applicants and the profession. Once we have completed this consultation, we will develop and publish guidance for applicants and solicitors and separate guidance for our assessment staff, all of which will be published on our website.

¹ www.gov.scot/news/legal-aid-review/

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Why are we consulting?

6. We are committed to a policy of prior approval for ABWOR which is consistent and easy to understand; proportionate (for both solicitors and ourselves); and which takes an appropriate approach to managing risks to the Legal Aid Fund.
7. Our discretionary powers in relation to prior approval for this type of case are broad. This means that is open to us to determine how we approach our decision-making in this area, including what we take into account. In reviewing our current practice in this area, we have identified that the factors we currently consider under our policy may not be proportionate or necessary, and are out of kilter with our approach to other areas of criminal ABWOR. This in turn means potentially unnecessary time on applications being spent by solicitors and our staff.
8. This consultation is an opportunity to engage stakeholders in our decision-making policy for this type of ABWOR prior approval by describing the decision we have to make and how we make it.

Expected outcomes of this consultation

1. Inform and contribute to appraisal of options for change.
2. Provide additional evidence on equalities issues for consideration as part of impact assessment.

Background to SLAB

9. SLAB was set up in 1987 to manage legal aid in Scotland as a non-departmental public body responsible to the Scottish Government. Our core business is taking decisions in connection with applications for legal aid and assessing claims for payment for work done. You can find out more about what we do on our website.²
10. As a public body our powers, functions and duties are set out in the legal aid legislation.³ That legislation defines precisely how some elements of the legal aid regime must operate, but we are also given some 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: for instance, that decision making must be rational and proportionate. One such area of discretion is how we approach requests for prior approvals in the context of certain types of criminal ABWOR.

² www.slab.org.uk/corporate-information/what-we-do/

³ The Legal Aid (Scotland) Act 1986 www.legislation.gov.uk/ukpga/1986/47/contents

The statutory framework for ABWOR prior approval in removal of driving disqualification cases

11. ABWOR is the form of legal assistance available to meet the costs of representation in cases relating to the removal of a driving disqualification.
12. The law governing our prior approval here is Regulation 13(1) of the *Advice and Assistance (ABWOR) (Scotland) Regulations 2003*, which provides that SLAB's prior approval is required for ABWOR to be given in relation to the proceedings described in Regulation 3h: that is, applications under section 42 of the *Road Traffic Offenders Act 1988* for the removal of a disqualification.
13. The Regulations provide us with significant discretion. Of particular interest is the fact that whilst the Regulations are clear that our prior approval is required, they do not specify a particular test for us to apply: this means that what we take into account is at our hands.
14. There are a number of other areas of criminal ABWOR in which our prior approval is required: in each of these areas, we do not apply a substantive merits test, but focus on ensuring certain procedural elements or conditions are in place.

Our current approach to the prior approval in removal of disqualification cases

This section of the consultation summarises our current approach.

15. Our duty as an administrative body is to take decisions in line with the legislative framework.
16. Where the legislative framework gives us authority to determine what decision shall be made and/or how a decision shall be made (this is our discretionary power), our approach and actions are reflective of our policy.
17. Our current policy comprises two parts. Firstly, we ask the solicitor to confirm that there is a statutory entitlement to a removal of the disqualification (i.e. that the statutory period of disqualification has elapsed). They must also confirm that the disqualification was applied by a criminal, rather than civil court. This part of the test establishes the validity and procedural competence of the application.
18. Where we are satisfied on these first elements, the second step is that - applying our discretion to identify a test - we then consider whether it is *reasonable* that the applicant should have the disqualification removed. We currently consider three factors in this assessment:

- i. Whether there would be a loss of a credible employment opportunity for which a driving licence is required;
 - ii. Whether there is an absence of suitable alternative transport for the applicant, such as public transport; and
 - iii. Whether the applicant is still likely to pose a danger to the public.⁴
19. We will only grant prior approval where we are satisfied against both the procedural elements and the merits test we apply.
20. The focus of this consultation is the second element - i.e. the test of reasonableness. Our view is that there is no scope for change with regards to the first set of elements.

Prior approval: identifying the appropriate test

21. As noted above, the test we apply in these cases - reasonableness - and the factors which we consider as part of that are at our discretion. The focus of our current policy can be seen as considering the *impact* of the disqualification and its removal on the applicant (factors 1 and 2) and on the other hand, the potential impact of the removal of the disqualification on others (ie the public).
22. This can be seen as a substantive merits test, akin to some of those applied elsewhere within the legal assistance regime but in contrast to other areas of criminal ABWOR in which we do not apply a substantive merits test.⁵ Our reasoning has been that it is appropriate for us - as a public body - to apply such a test in these circumstances, because the applicant has brought the case themselves, unlike other areas of criminal ABWOR.
23. The current factors are therefore intended as a means of considering whether an appropriate justification has been provided for the use of public money in the case at hand.
24. In practice however these factors do not appear to play a significant role in controlling access to public funding. Between 2020 and 2022, we received around 150 requests for prior approval of ABWOR in which the subject matter was removal of a driving disqualification (that is, around 50 a year). This is a low volume area.

⁴ For reference, the Road Traffic Act (Section 42(2)) stipulates that the court is to have regard to the following:

‘On any such application the court may, as it thinks proper having regard to—

(a) the character of the person disqualified and his conduct subsequent to the order,

(b) the nature of the offence, and

(c) any other circumstances of the case.’

⁵ For instance, ABWOR for proceeds of crime cases.

25. Of these applications, 70% were granted, 29% were refused and the remainder were either held, or rejected. It is important to note that most refusals are made on the basis that the applications for a removal of disqualification would not meet the procedural tests set out in the Road Traffic Offenders Act 1988, as opposed to refusals on the substantive merits of the application.

Proposed change option: focussing on procedural elements only

This section of the consultation outlines a proposal for which we are seeking feedback and input to assist us in further appraising and finalising our recommendation.

Our appraisal is built on assessment against the following objectives:

- Simplify the assessment but maintain scope of eligibility
- Easier access to legal aid for those eligible
- Reduced legal aid administration for solicitors, applicants and SLAB.

26. We have identified a change option that most feasibly allows us to meet our objectives for review and change. This option amends our policy by **removing the second element of the test we apply**: that is, reasonableness. The refreshed policy, therefore, would require us to be satisfied as to the procedural elements only, rather than involving us applying a substantive merits test in these cases.

27. Given the terms of Regulation 13(1) - in particular, the fact that the Regulation does not specify any test to be applied - our view is that this change is at our discretion.

28. Our refreshed policy on prior approval for these cases would therefore be as follows:

“Before granting prior approval for ABWOR to be given in these cases, we require confirmation that there is a statutory entitlement to the application for the disqualification to be removed, as set out in Section 42 (3) of the Road Traffic Offenders Act 1988: i.e. that the following disqualification periods have passed:

- a) two years, if the disqualification is for less than four years (disregarding any extension period),*
- b) one half of the period of disqualification (disregarding any extension period), if the disqualification is (disregarding any extension period) for less than ten years but not less than four years,*
- c) five years in any other case*

and, where the court has refused a previous application, that at least three months have elapsed since that refusal.

The solicitor must also confirm to us that the disqualification was imposed by a criminal court, rather than, say, a revocation of the driving licence as a result of disability.

Where we are satisfied as to the above, we will grant the application.”

Why are we proposing this change?

29. Our view is that the narrower policy set out above - in line with our discretion in this area and the lack of a specified test within the Regulations - strikes a more appropriate balance between the requirement for SLAB's prior approval and the task of looking at the substantive features of the case, which is ultimately for the court to determine.
30. On reflection, and in light of our experience of applying the current test in practice, we also consider that the factors we had applied as part of a substantive reasonableness test are neither a proportionate approach to prior approval in this area or consistent with how we approach prior approval for criminal ABWOR in other areas.
31. Finally, in looking at the specific factors we currently require to be addressed, we recognise that in practice, they may not be straightforward to satisfy in terms of what would count as appropriate evidence. In particular, the factor considering whether the client remains a danger to the public is not one which in practice we do tend to have regard to, given how challenging it is to demonstrate. Again, our position is that it would be appropriate to move away from the use of such factors in our policy.

What would this change mean in practice?

32. In practice, this change involves us removing the discretionary decision-making involved in our current position, meaning the prior approval process becomes simply a matter of confirming certain basic procedural information relevant to a case. The change simplifies our policy in this area.

Benefits

33. The proposed approach will result in a time saving for solicitors and our staff, as the more complex and time-consuming part of the test - addressing a variety of substantive merits-based factors - is removed. As noted above, the prior approval process simply becomes a matter of confirming basic procedural information, which should be a straightforward process, and one on which the required information/evidence is clear.

34. The time saving may also bring benefits for assisted persons (and others associated with them) by enabling cases to progress more quickly for example by reducing the need for us to seek further information in order to satisfy ourselves as to the substantive aspects of the current test.
35. The policy position will also be readily understandable, allowing clear guidance to be produced for both solicitors and SLAB staff, aligning with SLAB's values of transparency and consistency.

Risks

1. We have no evidence which suggests that this change would have a significant impact on the number of requests being received, and in particular, that it would mean an increase in the number of requests received.
2. Overall, we see no obvious risks in moving to this position - including with regards to the impact on different protected characteristic groups - but would welcome any alternative views on this.

Question 1

To what extent do you agree with this proposed change of removing the reasonableness test we currently apply?

(Strongly agree, agree, neither/nor, disagree, strongly disagree)

Please give a reason for your answer.

Question 2

Can you identify additional benefits or risks relating to the proposed change?

Yes (please elaborate); No; Don't know

Question 3

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to the proposed change?

Yes (please elaborate); No

Question 4

Please provide your views on any further aspects of prior approval ABWOR in removal of driving disqualification cases that have not been covered by responses above.

Responding to this consultation

3. 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.

4. Of course, views on any other matter would also be welcome. Please address these in the area provided at the end of the questionnaire.
5. We look forward to receiving your views on these issues and any other aspects of the proposed change to prior approval for work of an unusual nature.

Deadline

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

How to respond

Online

7. You can respond using our online [Consultation response form](#).

By email

8. If you wish to respond by email, please complete the [Word version of the Consultation Questionnaire](#).
9. Completed questionnaires should be emailed to: consultations@slab.org.uk.

Enquiries

10. If you have a query about the consultation process, please contact us at consultations@slab.org.uk.