

## Consultation on Advice and Assistance (A&A) and ABWOR

### About JustRight Scotland

JustRight Scotland is a registered charity (SC047818) established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working collaboratively with non-lawyers across Scotland towards the shared aims of increasing access to justice and reducing inequality.

We provide legal advice and representation on human rights and equalities issues across a range of legal areas including: women's legal justice, trafficking and labour exploitation, EU citizen rights, migration and citizenship, disability and trans legal justice.

Whilst our work is specific to Scotland, our work covers both devolved and reserved policy areas, and as such we endeavour to respond to policy consultations across both Scotland and UK, where appropriate.

As public lawyers for people who face systemic inequalities, discrimination and disadvantage, we use the provisions of the Human Rights Act 1998 (HRA) in our work, daily. In addition to providing direct legal advice to clients, we also run outreach legal surgeries and helplines, deliver rights information, training and legal education, and contribute to research, policy and influencing work.

### Our Response

Our response to the Scottish Legal Aid Board consultation on advice and assistance (A&A) and assistance by way of representation (ABWOR).

#### JustRight Scotland

JustRight Scotland is a Scottish Charitable Incorporated Organisation (SC047818) which provides legal services through its limited liability partnership, JustRight Scotland LLP which trades as JustRight Scotland (SO305962). This firm has been authorised to act as solicitors by the Law Society of Scotland (Registered No 53703).

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### **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?

See our response at Question 3

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

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 – e.g. civil, criminal - or making a general observation.)

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?

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?

N/A

For further information, please contact JustRight Scotland at:  
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