Introduction

The Board
1. The Scottish Legal Aid Board (the “Board”) is a non-departmental public body established by the Legal Aid (Scotland) Act 1986. The Board is responsible for the administration of legal aid in Scotland in terms of the Act and has the general function of:
   - securing that legal aid and advice and assistance are available in accordance with the Act;
   - administering the Scottish Legal Aid Fund (“the Fund”); and
   - monitoring the availability and accessibility of legal services in Scotland.

2. As a key partner agency in the justice sector, the Board has been involved in the work undertaken by Scottish Government prior to the drafting of the Court Reform (Scotland) Bill (the “Bill”). Additionally, submissions by the Board on a range of financial aspects of the implementation of the bill were included in the Financial Memorandum.

Legal Aid

3. There are several different types of legal aid and several different contexts in which one or other form of legal aid may be available. The nature of the legal aid, the eligibility criteria can vary from type to type and context to context. The contexts basically relate to the type of procedure, and for current purposes they may be broadly described as civil, criminal and children’s.

4. The legal aid types are:

   I. **Advice & Assistance** – comes in the general form and a particular form known as ABWOR
      (a) **General Advice & Assistance**
      Legal assistance which covers general work other than representation in a court, such as meetings, correspondence
      (b) **Assistance by Way of Representation ("ABWOR")**
      Legal aid for representation for certain specified hearings or types of case before a court or tribunal for which legal aid is not available.

   II. **Legal Aid**
    The main form of legal aid for representation before a court

Response to call for evidence

5. The Board has previously expressed its support for the changes to be brought into effect by the Bill. In its response to the Scottish Civil Courts Review and the consultation on the proposed Bill, the improvements expected to be achieved for the justice system and the public as a result of the changes detailed were welcomed by the Board. We continue to support the proposals for change.
6. The Board wishes to respond to the following aspects of the Bill.

A Part 1 Sheriff Courts

Specialisation and Summary Sheriffs

7. We are supportive of changes that will bring about increased specialisation of sheriffs including the introduction of summary sheriffs. Particularly in the field of family law, but also extending across to other areas of law we consider that specialisation along with the development and utilisation of effective rules and resource management in the court system will benefit parties and provide savings to the public purse which funds a significant proportion of such cases. Many cases, especially where the issues involve residence and contact to children, can be long-running and costly with the result that already tense situations can become exacerbated as the litigation continues. This is unlikely ever to be good for the children at the heart of such disputes.

8. The existing arrangements for handling family cases currently vary considerably from court to court. Some courts operate specialist family courts while others do not. The cost of legal assistance for family cases is a matter of concern at a time of significant pressure on the civil legal assistance budget as a whole. A strong proactive approach to the running of family cases is needed to ensure that parties are focussed on the issues truly in dispute in an action rather than consideration of matters which may be of a largely historical nature. This approach would go some considerable way to addressing the concerns about long running disputes articulated by the UK Supreme Court in the case NJDB V JEG & ANOTHER. All possible means of improving the system to allow for swifter dispute resolution is welcomed.

9. The Board has seen a substantial increase in the number of grants of civil legal aid for family related matters over the past six years with applications increasing by over 25% in this period. Of more significance however is the increasing cost of family cases over this period. In 2004/5 expenditure on family cases was £16.3 million while in 2012/13 expenditure was £23.5 million, an increase of 44%. Of those costs the highest single area of expenditure is in relation to contact cases where, in 2012/13, costs amounted to £6.3 million.

10. There is a wide variety of reasons for the increase in expenditure including local practices and the specific court processes followed in each case. In addition the increasing use of bar reports, psychologist reports and multiple child welfare hearings to monitor progress in contact cases rather than taking early decisions on the outcome of the proceedings leads to higher levels of expenditure. In 2012/13 the top 11% most expensive paid accounts in family cases accounted for 48% of the total civil legal aid expenditure on family cases. In contact cases £3.8 million was spent on 2,222 accounts submitted with costs below £6,000 while £2.5 million was spent on 254 accounts submitted where costs were over £6,000. In contact cases 39.5% of the total expenditure for this work was utilised on just 10% of accounts.

11. As part of the Board’s overall examination of expenditure on publicly funded cases we have focused on long-running sheriff court family actions. We have concerns about the lengthy processes and procedures used to try to resolve some of the most expensive family cases particularly when the issues involved
• did not appear to be particularly contentious;
• should not have required substantial amounts of court time to be resolved; and
• seem unlikely to have taken so long to resolve had the individuals been paying privately.

12. We favour changes in the procedures for handling family cases which will introduce more robust case management and a very proactive “hands-on” approach to actions that could otherwise have the capacity to spiral both in terms of cost and duration in proportion to the issues involved in the dispute. A reduction in the cost to public funds from expensive family cases could see significant benefits for the Legal Aid Fund while also providing swifter resolution of disputes at a proportionate cost. This is likely to be to the long term benefit of the families involved in those disputes.

13. A significant portion of the family cases that require to be heard in court use public funding. Figures from the Scottish Court Service indicate that in the past two years the number of family civil disputes brought before the court has declined. In contrast to this, as detailed in paragraph 8, the number of applications for civil legal aid for family cases and the total number of grants for such applications is increasing. The majority of cases heard by the courts will have at least one, if not more, party who is in receipt of legal aid.

14. Both in family actions, and also in relation to other actions, particularly those where there are commonly party litigants, and for that matter lay representatives, we consider it important that the procedures, court rules, forms and other components of the system that non-lawyers require to engage with are robustly designed to promote and ensure effective participation, with the perspective of the full range of users being included from the outset. Related to that, in the view of the Board, is a need to ensure that summary sheriffs are equipped with not just a clear definition of their role, but effective training and ongoing support resources and review mechanisms, all to ensure active and effective participation by the parties and case management to best advantage. The process for appointment of both specialist and summary sheriffs will no doubt ensure appointees have sufficient experience to maximise the respective advantages, and once appointed, both summary and specialist sheriffs should be deployed with sufficient resources and in a manner, and with rules and procedures, which gives full scope for the effective conduct of the range of shrieval work in the most cost-effective way.

**Jurisdiction and Competence**

15. A reduction in the number of cases brought before the Court of Session will reduce costs that may be incurred to the Legal Aid Fund. In 2012/13 the average cost of a publicly funded reparation action in the Court of Session was £30,862 while in the sheriff court it was £3,385. For medical negligence actions in the Court of Session the average cost of a publicly funded case was £30,968 while in the sheriff court it was £4,157. Any reduction in the number of reparation and medical negligence actions brought before the Court of Session using public funding is likely therefore to bring a reduction in cost to the Fund. We will work with the Scottish Government to ensure that legal aid fee structures correspond with any additional procedural requirements of the Personal Injury Court rules.

16. Another area for reduced costs arises from the fact that cases heard in the sheriff court do not attract the automatic use of counsel unlike Court of Session actions. If it is
considered counsel is needed for sheriff court publicly funded cases, an application seeking the approval of the Board for such use is required. We will grant sanction where it is appropriate. We provide guidance on this issue which is available to the profession in our various legal assistance handbooks. Generally before granting sanction for the employment of counsel we need to be satisfied that

- the use of counsel is appropriate;
- that the matter involves issues of novel, complex or unusual aspects of law; and/or
- that there are specific identified features in the case that require the involvement of counsel.

17. Many of the higher value claims that will need to be brought before the sheriff court could still have significant costs as, depending on the complexities, there may be multiple experts involved together with counsel. However, simply because a case has a substantial value it does not automatically mean it involves any particular complexities while more modest value claims may involve a range of complex issues that would justify the employment of counsel.

18. It should be noted that the success rate for publicly funded reparation cases is high at around 85%. Where cases are successful judicial expenses are generally sought and accepted rather than payment being made from the Legal Aid Fund. As such the net cost of reparation actions to the public purse is significantly reduced.

B Part Two – Sheriff Appeal Court

19. We have no submission to make in respect of this part of the Bill, although we fully support the establishment of the Sheriff Appeal Court, and we have comments under the later sections on civil and criminal appeals. We will work with the Scottish Government to ensure that the legal aid system, including fee structures, corresponds with the new court and its procedures.

C Part Three – Civil Procedure

Sheriff Court - Simple Procedure

20. It is noted that by virtue of Schedule 4 Part 4 of the Bill, there are provisions in relation to excepting certain simple procedure actions from the ambit of legal aid, broadly on the basis that currently applies in relation to small claims procedure actions currently.

21. With the abolition of both small claim and summary cause as distinct forms of procedure, and the approach adopted to the exception of certain forms of simple procedure actions (as described in the previous paragraph) it is clear that the intention is to leave simple procedure actions that are not within the excepted categories within the ambit of civil legal aid. This presumably is an intended equiparation with the current summary cause regime where legal aid is available. Presumably such procedure will relate principally to actions for payment in respect of sums greater than £3000 and less than £5000, as well as actions for recovery of heritable property.

22. As the procedure to be adopted in simple procedure cases has yet to be established, the Board would be keen to establish what the intended procedure is in this
respect as there will be a corresponding need for the Scottish Government, with the input from the Board, to establish an appropriate model for, and rates of, legal aid payment in simple procedure actions not excluded from legal aid.

**Sheriff Court - Interdicts and jurisdiction**

23. The majority of protective orders appear to work broadly successfully despite being Sheriffdom restricted and there is no indication that anything other than a minority of interdicts could usefully be susceptible to escalation over a wider area. However, giving all sheriffs the power, on cause shown, to grant an interdict over a geographical area wider than their own Sheriffdom could be of assistance in certain cases. The power to deal with any breach of an extended interdict appears proportionate and could assist in the enforcement of certain orders. There is a need for some care in ensuring controls both from the perspective of ensuring fairness and access to justice, and keeping costs down. Currently a party who fears that their opponent might seek interdict can lodge a caveat at the local sheriff court known to have jurisdiction to the effect of ensuring a right to be heard before any interim interdict is granted. If the opponent can use a neighbouring sheriff court or indeed one far away to try to obtain an interdict, the caveat system will require all-Scotland application. From the legal aid perspective cost effectiveness either for pursuer or defender is unlikely if proceedings are raised other than in the local court, and quite apart from any tactical reasons that a party might have to raise proceedings other than locally, the Board would be concerned if unnecessary cost to the public purse resulted from the additional travel required.

24. The numbers of applications for civil legal aid in relation to protective orders in the Court of Session which would have a Scotland wide impact are not substantial. In the year 2012/13 there were 13 applications for civil legal aid made in respect of protective orders. In the same year 7 such applications were granted. This contrasts with the 842 applications that were made for protective orders in the sheriff court and the 523 grants of civil legal aid that were made in that same year for protective orders.

**Court of Session – Judicial Review**

25. The Board welcomes the introduction of the time limit provisions, and the requirement for permission to proceed under reference to demonstration of sufficient standing and real prospects for success. Quite apart from the benefits to parties and the courts, these measures will also improve effectiveness and efficiency in the administration of legal aid, and should separately help achieve legal aid savings whilst still preserving access to justice, by removing from consideration for legal aid actions which it would currently be possible to raise but which would not meet the requirements for permission under the system envisaged by the Bill.

26. The Board has previously expressed the view that these changes alone, while very welcome, mainly address removal of only one of the two sets of circumstances currently giving rise to judicial review actions which might otherwise be avoided. That is to say that the provisions of the Bill address filtering out unmeritorious actions. The provisions of the bill do not take the opportunity to offer an effective and efficient way of dealing with sets of circumstances where, especially if incentivised or required to do so, parties could themselves resolve issues, without the need to go to court at all. In our experience there are many decisions (and decision-making processes) which give rise to the possibility of judicial review but which are, if conditions permit, incentivise or require it, susceptible to resolution between the parties, whether fully or partially.
27. In our view, there is a compelling argument to address not just a more effective system, but one in which costs, for all concerned, are avoided where possible, and controlled, where not. We note the likely or proposed procedure in relation to granting permission to proceed will be contained in regulations. We agree that the procedure suggested per Para 125 et seq of the Explanatory Notes and Para 186 of the Policy Memorandum to the Bill would be appropriate from a procedural perspective, but we think it is imperative to recognise that as soon as that procedure commences, significant cost accrues.

28. Looking at the procedure envisaged for the steps up to the decision of the Lord Ordinary as to whether permission to proceed is granted, and leaving aside any considerations of legal aid, if we understand the intention properly, parties will between them certainly incur total legal costs well into four figures, and in relation to anything other than straightforward cases, the total costs (over both sides) could easily exceed £10,000, even before the point is reached where it is determined by the Lord Ordinary if the case will proceed. While it is accepted that if the pursuer is legally aided the legal fees payable will be lower, the overall total cost will still be a substantial four figure sum.

29. In our view it is very important that parties potentially heading towards judicial review proceedings who might resolve or reduce their issues before the door of the court is crossed, are incentivised or required to do so.

30. The Scottish Civil Courts Review noted existence of the pre action protocol system in judicial review cases in England and Wales. Although the idea of a pre-action protocol contributed to the recommendation in the Review of the introduction of a requirement to obtain leave to proceed with a judicial review, which the Bill adopts, for the reasons indicated in the preceding paragraphs, a system of pre-action protocols should be adopted in addition to the envisaged steps for permission to proceed, principally to give proper scope to those disputes or parts of disputes which can or might be resolved without the need for any court process, to be resolved pre-court and thereby minimizing procedure and very significant expense.

31. In England and Wales the pre-action protocol procedure (“PAP”) is optional and not mandatory. As we understand it, failure to follow the PAP does not invalidate any application for leave to proceed with judicial review but can have consequences in the discretion of the court subsequently as to issues of expenses and case management.

32. In our view these PAP mechanisms are important components in the process. The PAP may not itself directly remove unmeritorious applications but it has significant scope to remove applications in situations where the dispute is susceptible to resolution or partial resolution between the parties themselves. It may however indirectly assist in filtering out unmeritorious applications in situations where legal aid is sought in that an applicant who does not use the PAP without good justification may be refused legal aid.

33. As well as administering the Scottish Legal Aid Fund, the Board is, in any event, a public body making decisions which can potentially be subject to judicial review. The increased scope for resolution of challenges pre-court could have a significant saving in terms of both resources internally for the Board and cost. The legal aid arrangements do not have a statutory appeals mechanism and parties can take a range of approaches to challenging decisions made by the Board. Some of these can involve recourse to the court by parties in circumstances where issues might or would be susceptible to further
consideration and discussion to avoid the need for court proceedings or to minimise areas of dispute. The incentivised or mandatory use of a pre-action protocol by parties challenging Board decisions would be a significant benefit.

34. The use of PAPs would in turn shape consideration of when the three month time period starts. That would not be problematic. For example, use could be made of a provision that the three month period ran from the date upon which the grounds giving rise to the application first arise or the date of conclusion of any PAP, whichever is later.

35. The use of PAPs would also assist in reducing what might otherwise be a significant increase in the use, and cost, of legal aid special urgency provisions for persons seeking to raise judicial review to comply with the new restricted time period, and where insufficient time exists to exhaust other options, e.g. a negotiated resolution.

Lay Representation for Non-natural persons

36. The Board recognises the issues facing non-natural persons as highlighted by the Apollo Engineering case.

37. The availability of lay representation to non-natural persons may potentially increase the presence of non-natural person in court proceedings whether as pursuers (initiating more proceedings) or as defenders (with an increased likelihood of defending proceedings). Perhaps more in relation to the situation where the non-natural person is pursuer, there is a possibility that where a natural person is the opponent in such proceedings, they may make recourse to legal aid, whether for advice under Advice & Assistance, or for representation under Civil Legal Aid.

Procedures and Fees

38. The provision for the regulation of procedure and fees by act of sederunt are noted. In relation to fees of specified categories of persons it is noted that the draft Bill which accompanied the original consultation document, included the draft provision that both solicitors’ and advocates’ fees would be regulated by act of sederunt. It is noted that in the Bill as now framed, the reference to advocates does not appear, and the Policy Memorandum explains that the inclusion of advocates would be a departure from current practice. The indication that the Scottish Government would wish to deal with advocates’ fees separately and possibly as part of the response to Sheriff Taylor’s review is also noted.

39. The Board is of the view that the proper and effective management of cost in the courts system, in which it has a substantial interest, requires fees and expenses incurred by all whose involvement creates a cost, to be much clearer and more susceptible to control.

40. It is noted that the fees of solicitors continue to be seen as susceptible to regulation by act of sederunt. In the Board’s view, this should logically extend to the fees of solicitors incurred while exercising rights of audience in the superior courts. That being so, it becomes less clear what any basis for refraining from adopting a similar approach to advocates fees might be. Whatever approach is to be taken, the Board would wish to express the view that early steps are taken in respect of all components which constitute costs in the court processes, to achieve clarity and control of costs.
Vexatious Litigants
41. The Board supports proposals to deal appropriately with vexatious litigants. While such individuals may not be able to access public funding for their case as they may not meet the statutory tests for civil legal aid of financial eligibility, probable cause and reasonableness there is still a significant administrative burden imposed in the processing of an application even if it is ultimately refused. If (as is proposed) a vexatious litigation order is made in relation to a person, the Board would be able to avoid or restrict costs being incurred, whether in relation to any application by that person subject to the order, in that they would have difficulty meeting the statutory eligibility criteria, or in respect of those who would have been opponents and would have had to apply for legal aid, but for the order keeping the matter from getting to court.

D Part 4 – Civil Appeals
42. The Board notes the provisions in the Bill in respect of the establishment of the Sheriff Appeal Court and the wider changes proposed in relation to the Court of Session and Supreme Court. The view of the Board is that as well as the wide ranging system improvements which will result, there will be welcome efficiencies and savings in respect of legal aid by the various arrangements suggested.

43. The operation of the Sheriff Appeal Court will be to a large part in procedural rules, but could be potential for more effective and cost efficient processes, with concomitant savings for the Scottish Legal Aid Fund if there are both sift processes to filter out unmeritorious appeals, and fast-track or simplified processes for appeals of a more administrative and possibly uncontested nature, e.g. where a party has failed to meet a time limit.

E Part 5 – Criminal Appeals
44. In a similar vein to the civil context, the Board considers that the Sheriff Appeal Court in criminal appeals will allow significant system-wide improvements and efficiencies. Standing that most criminal business before the courts has legal aid involvement to some extent or another, the Board anticipates tangible savings. Previously, for the Financial Memorandum, the Board suggested savings of £120,000 per annum, but there are a number of variables, and the savings could be greater.

F Part 6, 7 & 8
45. We have no submission to make in respect of this part of the Bill other than to say that we support the creation of The Scottish Courts and Tribunals Service.

Scottish Legal Aid Board
18 March 2014