FACULTY OF ADVOCATES

RESPONSE BY THE FACULTY OF ADVOCATES TO INDEPENDENT STRATEGIC REVIEW OF LEGAL AID

[1] Introduction

[1.1] The Faculty of Advocates is pleased to respond to the call for evidence by the Independent Review of Legal Aid. We share the Scottish Government's objective of ensuring that rights are made effective for all members of Scottish society. The Faculty has a proud history of contributing to this objective and seeks to continue to do so in the future.

[1.2] Advocates are distinguished by their skills in knowing the law and in presenting evidence and legal argument in courts and tribunals. We deal with complex litigation: cases where there are serious consequence for members of society in terms of (among other issues) their liberty, their families and their property. Over more recent years there has been a rising international element in our work. We make a strong contribution to making legal rights effective for all members of society.

[1.3] We are sole practitioners, dependent upon fees paid for individual cases. Legal aid allows us to provide services to those who cannot employ an advocate from their own resources. We have a strong tradition of representing persons accused of crimes, persons engaged in litigation relating to their families in both the public and private sphere, and in immigration work, as well as other areas where assistance is required. Without our assistance vulnerable members of society would be facing serious personal and social issues without the benefit of skilled advice and representation. Legal aid

allows us to contribute towards the effective delivery of legal services in complex and serious cases.

[1.4] The Faculty appreciates the continued availability of legal aid on demand in Scotland. This allows us to play our part in making rights effective. The 'rationing' of legal aid is sometimes frustrating, in so far as we are required to spend time and energy explaining why a case is complex or serious enough to justify the involvement of an advocate. It would be helpful if this process could be streamlined. It is also a source of frustration that the fee structure for legal aid does not always match the court process, leaving us justifying remuneration for work required by the court. There is a disconnect between modern litigation, which is loaded towards advance preparation and settlement, and the legal aid remuneration structure which is geared towards appearance in court. A structure that placed greater weight on preparation and resolution would suit both litigants and advocates, and would reward efficiency.

[1.5] Our response to the review considers issues arising from the perspective of criminal law, family law, immigration and asylum law and other areas of work.

[2] Criminal Law

[2.1] For almost five centuries, the Faculty of Advocates has been an independent body of court practitioners, some of whom specialise in the representation of persons accused of the most serious crimes in our country. While it is a self-regulating body, the Court of Session and the High Court of Justiciary has traditionally delegated the task of preparing intrants for admission to the Faculty. This task, which has historically involved the process of examination as well as intensive practical instruction, is now overseen by the Faculty's Director of Training. No one can be presented to the Court as suitable to practise as an advocate without satisfying the rigorous training requirements. Accordingly the Faculty prides itself on the expertise which is available from within its ranks. It is also acutely aware that in many areas of law the conduct of proceedings by an advocate involves remuneration from public funds. The recent establishment of the Quality Assurance Programme in 2016 has further served to recognise the importance

and responsibility which the Faculty attributes to the disbursement of public money in upholding the interests of justice.

[2.2] The provision of legal aid in criminal law is, and will remain in the immediate future, the area where the public body administering the fund is most frequently scrutinised. It can often be unpopular for the public to learn that persons accused, or guilty, of the worst criminal offences in our society incur expensive representation. The Scottish Legal Aid Board are administering a fund which is a fundamental part of our democratic society, allowing for the poorest, most vulnerable and sometimes mentally afflicted persons within our society to be represented by highly skilled advocates.

[2.3] The continuance of representation by the very best lawyers is undoubtedly under threat from market forces. The Faculty is a dedicated body of lawyers with expertise in criminal law whose members have served the courts with distinction; but its ranks are diminishing in numbers due to competition from solicitor-advocates (whose regime of examination and training is considerably less onerous), the reduced number of cases being indicted in solemn proceedings (cases to be tried by jury) and the disinclination of junior counsel to seek admission to the rank of senior counsel (QC) because of the limiting of cases in which senior counsel is sanctioned. The new fee structure, established in 2006, was intended to undergo triennial review, but this has not occurred to date, in the face of continuing budgetary constraints. Unless this matter is addressed with urgency, the consequence over time will be a diminution in the quality of representation generally and, potentially, the eventual disappearance of advocates as pleaders in the most serious cases. No one can take any pride in presiding over "a race to the bottom".

[2.4] The taking of evidence of vulnerable and child witnesses and its presentation to a court, and particularly to a jury in solemn cases,, is perhaps the most significant and challenging innovation facing our courts in the immediate future. New procedures will include the framing of questions in advance of cross-examination by an advocate which may comprise the entire extent of questioning or, conceivably, the drafting of questions for an independent examiner or intermediary who will conduct all questioning of a child (or vulnerable) witness. Increasingly, advocates are being called upon to participate in the preparation of cases well in advance of any trial. For example, they are frequently required to spend very considerable periods of time watching and listening to Joint

Investigative Interviews of child witnesses in controlled environments which will represent the entire evidence-in-chief of the witness. Advocates require to attend at a secure site for this purpose, because of the concern of the prosecution in releasing copies of the recordings in case they fall into the "wrong hands". No proper and consistent remuneration has been allocated for this very important preparatory work, the frequency of which is likely to increase significantly. Equally, the taking of evidence on commission will be a more frequent occurrence in child or vulnerable witness cases. The court will have a power to fix post-commission hearings (Practice Note No.1 of 2017) in order to regulate, amongst other things, the presentation of the evidence taken on commission, its editing (if so required) and its admissibility.

[2.5] The provision of criminal justice is constantly being refined and ameliorated. It is important that the Faculty of Advocates embraces the changes and rightly acknowledges the public interest in an efficient and fair system to protect the rights of those who are accused and whose liberty might be affected. That ethos and those values should be shared by the body administering the public funding which is required for the delivery of legal services. We commend a shared interest in the development and improvement of the criminal justice system but we would caution against a perceived inclination to diminish its importance within a budget which faces competing demands on finite resources. In the last decade, the payment in real terms for the provision of publicly-funded legal services has fallen significantly. It must be recognised that a continuance of that decline will ultimately undermine public confidence in the justice system.

[2.6] In assessing the ways in which wider organisational arrangements can support and enable the delivery of legal aid services, it is worth recognising the way in which advancing technology has enabled certain court hearings to be conducted by video link, notably Appeal Court hearings and Full Committal hearings in the Sheriff Court. The playing of video recorded evidence in trials is likely to increase significantly in the future. The delivery of legal aid services can equally be improved by embracing the advances in technology. We would endorse the response of our colleagues who specialise in family law in seeking a more streamlined and easily manageable application process, particularly for the seeking of sanction for the instruction of counsel, the instruction of senior counsel and the instruction of expert witnesses. The Notes prepared by counsel in support of sanction applications are often lengthy, time consuming and always unpaid.

This process can be foreshortened by a simple pro-forma application and thereafter a video conference with the supporting counsel in which submissions can be heard. The speed of the process enables lawyers to take decisions at an early stage of proceedings which is always preferable.

[2.7] Positive outcomes for and with the people of Scotland will be achieved if there is public confidence that the justice system works and persons can readily gain access to it. The issue of access to justice, that is the vindication of a person's legal rights or a person's innocence in the face of criminal allegation through the court system is at the very heart of our justice system. The Faculty appreciates that the legal aid fund is a finite resource which has to be managed for the benefit of competing interested parties. There is little doubt that the provision of criminal legal aid is not a "vote winner" from a political perspective. Nonetheless, it is a cornerstone of democracy that a person should have access to representation in the face of a criminal allegation. In Scotland, the standard of representation even for the poorest and most destitute is high, but will only remain so if the commitment to support that representation is maintained and financial arrangements are improved.

[2.8] The principles upon which the Scottish Legal Aid Board administers public funds to remunerate the legal representatives of litigants and persons accused of crimes are unquestionably sound. The way in which that function is carried out is often cumbersome and subject to delay. Devising a new system which is more effective and "person-centred" is unnecessary. The current system requires only modest adjustment to be workable for all. In particular, the Legal Aid Board must be conscious of rates for privately-funded work which exceed publicly-funded work by almost four times. There exists a very real prospect that the standard of representation available for publicly-funded work will gradually but significantly diminish over a relatively short period as the continuing reduction (in real terms) in the rate of remuneration disincentivises advocates further.. There is a strong ethos among advocates of "serving the public" in the practice of criminal defence at the highest level. It is a service which should not be taken for granted.

[3] Family Law

In response to the four broad questions, in the field of family law we would provide the following answers.

[3.1] What shared values and ethos should underpin legal aid services and how best can they be embedded in the delivery of legal services in the future?

Shared Values and Ethos

[3.1.1] So far as the Faculty of Advocates is concerned, the value and ethos of legal aid services should be to ensure the provision of legal services to enable the financially poorest members of society to have "access to justice" (ie the ability to vindicate legal rights through the courts) in a manner that is broadly comparable to the right of the private fee paying litigant to do so.

Underpinning of delivery of legal services with shared values and ethos

[3.1.2] In relation to how the value and ethos of legal aid services might best be embedded in the delivery of legal aid services in the future we consider that it might be helpful to look at the areas within family law in particular where the defined value and ethos underpinning legal aid services appears to be most threatened. In this regard and in relation to child law in particular we suggest that the underlying value and ethos is threatened by delays in a grant of legal aid, delays in granting sanction for counsel and delays in granting sanction for experts.

Impact of delays in grant of legal aid

[3.1.3] A delay in grant of legal aid in the first instance can be an issue particularly if the case is litigated in the Court of Session. Where there is a delay in the grant of legal aid the assisted party's active and meaningful participation in the litigation is hindered. This can cause prejudice at a later stage. While it is recognised that not all delays in a grant of legal aid are due to the providers of legal aid services, we have been aware of cases where there appears to have been delay in the grant of legal aid for no apparent or obvious reason. In the case of *B v G* 2012 SC (UKSC) 293 the Supreme Court referred to the need for expedition in cases concerning the welfare of children. In relation to adoption/permanence order cases, the Court made obiter comments in *S v L* 2013 SC

(UKSC) 20 about the need for expedition in child cases. More recently the Inner House in *SM v CM* 2017 SLT 197 has stressed the need for quick resolutions in child cases. The court rules and practice in cases concerning children now have an increasing emphasis on expedition. The Court of Session and Sheriff Court procedure rules for adoption and permanence orders enforce the procedural impetus for expedition in progressing these cases. For example, in terms of the fixing of a proof in a permanence order case in the Court of Session RCS 1994, rule 67.31(1)(b)(ii) provides that a proof should be assigned not less than 12 weeks and not more than 16 weeks from the date of the initial procedural hearing. In our experience the Court of Session generally adheres to this timetable. The current procedural rules concerning section 11 actions in the sheriff court also reflect the need for expedition in these cases (see rule 33AA," Ordinary Cause Rules" 1993).

[3.1.4] Against a procedural and "best interests/welfare" backdrop that requires the expedited resolution of child cases, delays in the grant of legal aid can be extremely prejudicial not only to assisted parties but also to the children concerned. Delay in litigation concerning their future is inimical to children's welfare yet a delay in participation in the legal process due to legal aid not being granted quickly can be (and often is) prejudicial to the assisted party's ability to participate fully in legal processes to enable the effective vindication of legal rights. The difficulty for the court in determining whether a motion for discharge of a permanence/adoption proof should be granted as a consequence of a delay in a grant of legal aid is clear, given that the court has to balance the child's welfare/best interests against the assisted party's rights to participate in the court process.

[3.1.5] A positive example of legal aid being granted quickly (generally) is in cases under the Child Abduction and Custody Act 1985 (Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 "The Hague Convention"). In such cases there is a clear expression in "Brussels II bis", (article 11) that cases involving wrongful removals or retentions of children habitually resident in other Member States "shall" be resolved "no later" than 6 weeks after the date of the application being lodged except where "exceptional circumstances" make this "impossible". Generally, in our experience, this deadline is adhered to with the majority of contested cases being heard within about 6 weeks. The expeditious grant of legal aid

assists with the 6 week deadline being met and we believe there is a correlation between expeditious awards of legal aid and resolution of relevant cases within an accelerated timetable.

Impact of the Delay in Granting Sanction for the Employment of Counsel

[3.1.6] The issue in relation to sanction for the employment of counsel arises more commonly in Sheriff Court litigation. Here in the context of permanence orders/adoption cases, there is a similar procedural rule (Act of Sederunt (Sheriff Court Rules (Amendment)(Adoption and Children (Scotland) Act 2007)2009/284, rule 35) in relation to the timing of the fixing of a proof. Anecdotally this rule is not as strictly adhered to the sheriff court as in the Court of Session. However the need for expedition in adoption and permanency cases is not only embedded in the relevant procedural rules but also in the relevant Practice Notes for each Sheriffdom.

[3.1.7] While not all permanency cases/adoption cases are complex many are, for the reason that more often than not they involve the handling of a large amount of evidence accumulated from a number of sources and over a number of years combined with highly emotive and highly charged subject matter. The intervention of the State resulting in the often complete severing of the parent/child relationship requires careful and considered legal representation. Most frequently, permanence/adoption cases concern the children born to the most socially disadvantaged members of society. These factors make permanence/ adoption cases appropriate for the grant of sanction for counsel. Similar considerations apply to proofs concerning referral to the children's hearing in terms of the Children's Hearings (Scotland) Act 2011.

[3.1.8] Many of our members have been involved in cases where sanction for counsel in adoption/permanence/ contact cases was not granted until a late stage of the litigation. While we are able and willing to assist, even when instructed at a late stage, late instructions make it difficult for us to advance the best case or to focus an existing case. It may be necessary to ask for a proof to be put off in order to make further inquiries, but such a request will not always be acceded to. There are occasions when the court will require the case to proceed regardless of the state of preparation. One consequence of late instruction may be an increase in the number of days required for the proof to be

heard. There are frequent difficulties in identifying available dates for continued proofs in the Sheriff Court, including synchronizing shrieval and counsel's diaries. This can mean that the time frame over which the case is conducted is unnecessarily protracted.

[3.1.9] We believe that the input of the family bar/Advocates' Family Law Association has been instrumental, particularly in the Court of Session, in promoting case management in family cases through the use of procedural by order hearings, exchange of expert reports at the earliest stage and the use of affidavits in place of oral evidence in chief. We believe these case management tools have been effective in expediting cases in the Court of Session and ensuring proof dates in as many cases as possible are not only retained but in ensuring the completion of proofs in the allocated number of days. We have been active in training solicitors in these case management techniques. Lack of flexible legal aid cover inhibits the development of such techniques in legally aided cases.

[3.1.10] In Sheriff Court cases where there is an identified need for counsel we believe the instruction of counsel at the earliest opportunity would assist in the more expeditious resolution of complex and/or emotionally charged cases. In our experience where counsel is instructed at an early stage in proceedings the completion of proofs within a realistic and reasonable time frame usually follows. Not only can this result in cost savings but it is also likely to be to the benefit of legal aid service users as their cases are resolved more quickly. In our experience all too often a solicitor at an early stage in a case correctly identifies the need for counsel and all too often sanction for the instruction of counsel is refused until much later in the process. By that time the assisted party might have suffered prejudice but more commonly case management is likely to have been ineffective, meaning that the only way the case can be resolved is by a costly extended proof at which counsel's expertise is most definitely necessary. The Faculty of Advocates believes that the early instruction of counsel in appropriate cases in the sheriff court would result in more efficient litigation.

Impact of delay in instructing experts

[3.1.11] Another difficulty that we have identified as commonly arising is in relation to the grant of sanction for the employment of experts. Where counsel has identified that the employment of an expert is necessary, delays in legal aid sanction being granted can

cause serious prejudice to the assisted party especially when considered against a backdrop of expedited causes. It is our experience that the late instruction of an expert (for whatever reason) can result in proof diets being lost and cases being delayed. A good expert witness can be invaluable in narrowing contentious issues or leading to a proof being unnecessary. Often in our experience sanction for identified experts is refused and then granted when requested again at a later stage in the case. It is not clear why initial sanction for expert witnesses is so often refused and then granted at a later stage. The difficulties in dealing with expert evidence produced at a late stage of the court process are clear.

[3.1.12] If the delivery of legal aid services is to have the value and ethos that underpins it embedded within it the Faculty of Advocates considers that the delays in the current system of grants of legal aid/ appropriate sanction applications require to be addressed.

More flexible remuneration structure

[3.1.13] A more recent issue that the Faculty of Advocates has identified in relation to the provision of legal aid services is that providers are often slow to respond to/adapt to procedural changes in terms of the remuneration of, in particular, counsel. As set out, procedure in child law, but also in judicial review applications, increasingly emphasizes the "front loading" of cases. We think that the benefit of front loading is that the parameters of cases are clearly defined at an early stage meaning that more expeditious resolution is likely. We believe that the current legal aid pay structure does not allow for adequate remuneration of counsel for essential work carried out at the early stages of the case, while rewarding cases that proceed to proof or a substantive hearing. By way of example, if a witness is required to give evidence in chief by way of affidavit counsel, in a case in which s/he is instructed, may be instructed to check the affidavit. As the affidavit is to be the party's evidence in chief counsel may have to spend a number of hours revising it (eg by considering what s/he would ask if examining the witness in chief) but is only remunerated for this work at the rate of £50 plus vat and then only if the affidavit is lodged in process. By contrast if counsel examines the witness in chief in court s/he is paid at the daily rate for conducting a proof.

[3.1.14] We consider that the current fee structure for payment of counsel in family/child actions does not reflect the current procedural rules, as it does not allow adequate remuneration for work carried out in support of case management and at an early stage of the proceedings. We are of the view that broader and more flexible pay rates require to be considered in order that work carried out to ensure expeditious resolution of cases is adequately and appropriately rewarded.

[3.2] How best can wider organizational arrangements (including functions, structures and processes) support and enable the delivery of effective legal aid services.

[3.2.1] Using, for the purposes of setting parameters, the examples given in answer to the first question, we would answer the second question as follows:

Pro Forma Sanction Applications

[3.2.2] We consider that more streamlined and easily accessible applications processes, including for sanction applications, should be introduced. In that regard we consider that "pro forma" sanction applications for counsel and experts would save time and expense. In addition, with a pro forma application, SLAB's criteria for determining whether a grant of sanction is appropriate would be easily accessible with counsel being readily aware of what the Board seeks in terms of relevant information. The requirement for counsel to draft a note for a grant of sanction for the employment of counsel or an expert is time consuming. It is often either not remunerated or poorly remunerated and, too often, although drafted with reference to the relevant SLAB criteria, appears to fail to meet those criteria. A simple downloadable application setting out the criteria SLAB requires to be addressed with the facility to append a note/further information, where appropriate, would do much to simplify and expedite the process of seeking sanction for counsel and experts. Counsel would require to exercise the same expertise as is now required, but the administrative requirements for all concerned, including SLAB, would be reduced, and there would be less scope for misunderstanding of the criteria for grant of sanction. This would hopefully result in meritorious applications being granted at the earliest opportunity.

Introduction of more flexible remuneration structure

[3.2.3] In relation to ensuring that work carried out with regard to case management orders is adequately remunerated, more flexible payment rates are required. These pay rates should take account of the type of work involved in case management procedures to ensure that counsel who work hard to ensure court timetables and case management orders are complied with are adequately and appropriately remunerated. The Faculty of Advocates recognizes that legal aid payment rates are lower than those they can charge on a private basis. Many advocates at the family bar undertake legal aid work because of a belief in social equality. While it is accepted that remuneration rates for legal aid are lower than private rates, much of the necessary case management work (e.g. revisal of affidavits when those affidavits are in lieu of evidence in chief or preparation for and attendance at case management hearings, for which a significant amount of preparation is required and in respect of which SLAB allows no fee for preparation) is either not remunerated or very poorly remunerated. A revised payment structure with flexibility to allow for payments to take account of changes in case management/court procedure would complement the current court emphasis on case management and expeditious disposal of family law cases, particularly cases concerning children. As one of the reasons for case management and expeditious disposal of cases is to ensure costs are minimized (*B v G*, *op cit*), we consider that revisal of the payment scales would be of benefit in the efficient management of the provision of legal aid services in Scotland.

[3.2.4] In relation to remuneration, a more flexible payment structure that correlates to emerging ways of preparing a case and offers a defined remuneration structure for preparation would assist in the delivery of effective legal aid services. It would also promote greater consistency and fairness in the payment of fees.

[3.3] How best can legal aid services achieve positive outcomes for and with the people of Scotland?

[3.3.1] The Faculty of Advocates considers that legal aid services that enable "access to justice" for particularly the most socially and financially vulnerable people of Scotland are likely to achieve positive outcomes for all of the people of Scotland. The provision of legal aid services, including the ability to instruct counsel in appropriate cases, should

ensure that the most socially and financially vulnerable people of Scotland have the opportunity to be as well represented as those who can pay privately. In relation to applications for permanence orders or Children's Hearings proceedings the respondents in such cases are more likely to be socially vulnerable parents and we consider it is important that those people are given the opportunity to defend to the most appropriate extent those proceedings where the State seeks to limit or restrict their family lives.

[3.3.2] We consider it is important that legal aid continues to be available for the instruction of counsel in all cases where the State seeks to "interfere" in the family lives of socially vulnerable people, in order to ensure protection of one of the most basic human rights, the right to respect for family life.

[3.3.3] We consider counsel have been instrumental in recent years in assisting the courts to interpret in an ECHR compliant manner legislation that permits the State and the courts to "interfere" in family life, so as to ensure that any such interference by a public body in Scotland is necessary, justified and proportionate. We consider that the ongoing provision of legal aid, remunerated by reference to the type of work done and at a fair rate, to enable the instruction of counsel in appropriate cases is an excellent way of ensuring that legal aid services achieve positive outcomes for the people of Scotland.

[3.4] If you were designing a system of legal aid today what would you do differently from the current system to make it more effective and person-centred?

[3.4.1] The Faculty of Advocates recognizes and appreciates the continued availability of legal aid in a wide range of cases dependent on financial eligibility. We would hope that the availability of legal aid in a wide range of cases will continue and consider that if the system of legal aid is flexible enough to respond to changes in the way law is practised (by for example the front loading of family cases) to ensure that counsel (and solicitors) are adequately remunerated for the work they do, then there remains much to commend the current system of legal aid.

[3.4.2] Clearly political and economic factors have a significant impact on the provision of legal aid services. We consider that as far as the instruction of counsel is concerned,

adequate remuneration for work done and a pay structure that rewards work done in relation to "front loading" cases rather than just for the conduct of proofs is one way of ensuring counsel with their specialized expertise are going to be willing to continue to undertake legal aid work. In terms of the efficient management of cases, a pay structure that is tailored to the work actually undertaken is likely to facilitate the cooperation of counsel in case management processes and the expeditious resolution of cases that is to the benefit of service users and the providers of legal aid services.

[3.4.3] We do not consider that beyond modernizing to take account of technological/IT advancements (eg standardized sanction application forms) and the introduction of more flexible payment structures there is much we would change to make the current system more effective and person centred.

[4] Immigration and asylum law

[4.1] The view of the Scottish Immigration Bar of the existing Scottish provision of legal aid for migrants and asylum-seekers is a positive one. We are acutely aware that for our colleagues south of the border legal aid is not available in respect of immigration (as opposed to asylum) work. Although ordinary immigration law seldom involves the issues of life and death that arise in asylum, it is in immigration law that one is most likely to see the dire effect of adverse decision-making on British citizen family members of the migrant concerned. We hope that the present Review will recognise the value of the distinctive Scottish approach, which continues to provide public funding for both asylum and immigration work.

[4.2] We would particularly wish to commend the pragmatic approach of the Board to the funding of counsel in the Immigration and Asylum Chamber of each of the First-tier and Upper Tribunals in Scotland. Sanction is granted for the employment of counsel through Advice by Way of Representation ('ABWOR') routinely and without difficulty. We are in no doubt that in consequence a great deal of Court of Session litigation is avoided, with a consequent significant saving to the public purse. The involvement of counsel at tribunal level appears to work well and with remarkably little red tape. Scottish solicitors use common sense in selecting the cases appropriate for counsel, and counsel act professionally in their advice on the merits of pursuing such appeals, for example in

declining to state grounds. We understand that the immigration judiciary in Scotland both welcome and value the involvement of Scottish counsel at tribunal level.

[4.3] Such concerns as we have as to the operation of legal aid relative to immigration and asylum pertain to the operation of civil legal aid for litigation in the higher courts. Again we wish to emphasise that overall the system works well. The Board relies on the opinion of counsel in determining when to make civil legal aid available, and pays counsel to provide such opinions. Counsel is generally accepted as giving dispassionate and often robust advice so that the funding of unmeritorious litigation is avoided. Of course there will always be complaints about rates, but generally speaking Scottish counsel can make a reasonable living in immigration practice as a result of cross-subsidy of purely legal aid work by judicial awards of expenses in cases where the petitioner or appellant succeeds against the Home Office, and a certain amount of private work. The one concrete point to be made about legal aid rates is that since it seems possible that Brexit will trigger a period of high inflation, there will need to be mechanisms in place for keeping legal aid rates in line with inflation, but that is a point to be made across the board and not just by immigration counsel.

[4.4] The pressing strategic concerns that we do entertain pertain less to legal aid itself than to the context in which it operates. These are: the importance of judicial recovery; the chilling effect of section 19(3)(c) of the Legal Aid (Scotland) Act 1986 in permitting the award of expenses to the Home Office out of the Legal Aid Fund in appellate proceedings; and the malign impact of Court fees.

[4.5] The availability of judicial recovery of expenses from an unsuccessful party, in this case invariably the Home Office, in the event of successful litigation in the Court of Session, is an invaluable asset in the provision of access to justice. First, it operates as a powerful positive incentive to solicitors and counsel to have rigorous regard to the merits of a litigation before incurring public expense to the Board and to the Court. Secondly, and this is the other side of the coin, it operates as at least some incentive on the Home Office to maintain a certain quality of decision-making. And thirdly, perhaps more significantly to us, it is an essential component in the viability of our practices. We would

oppose any representation on the part of the Home Office that it should be exempt from judicial recovery of expenses by an assisted person in cases where it does not succeed.

[4.6] A related point is that section 19(3)(c) of the 1986 Act permits the Court to award expenses out of the fund itself where an assisted person has been unsuccessful in a court not of first instance, i.e. in appellate proceedings. This power had not been exercised until quite recently, when it was successfully invoked in *Ashiq* 2016 SC 297. Since then the Home Office has routinely sought expenses from the Fund in Inner House proceedings in cases where an assisted person has been unsuccessful; that has included cases, such as *Ashiq* itself, where the party had succeeded at first instance. We would be surprised if this provision had not had a chilling effect on the funding of Inner House litigation, and even if it had not, it seems inequitable to reduce the Legal Aid Fund in such cases. We would propose that section 19 of the 1986 Act be amended so as to exclude from its scope appellate litigation where the Board had acted reasonably in funding the assisted person.

[4.7] Although strictly outwith the scope of this review, a significant obstacle to access to justice in this as in other jurisdictions is the imposition of court fees at a level which may reasonably be termed swingeing. It has been possible in the past for a not insignificant number of immigration litigants in the Court of Session to proceed on something amounting to a no-win-no-fee basis, where for whatever reason legal aid has not been available; and no system of public funding can ever hope to cover all potentially meritorious litigants. Counsel will be paid at commercial rates if the litigation succeeds, and will absorb the loss if it does not. This safety valve is now closed off by the fact of court fees charged at a rate of £300 per half hour in the Outer House and £500 per half hour in the Inner House. We regard Court fees as antithetical to the conception of the legal system as an essential function of the state and justice as being available to all, but if they are to be retained, then some thought needs to be given to a mechanism for circumventing them when counsel is prepared to act speculatively.

[4.8] Finally, we are asked to give examples of projects, services, innovations or improvement work, which may be relevant to the work of the review. We would commend the work of the Board in funding certain immigration related projects over the

years, including the work of the Ethnic Minorities Law Centre and the Women and Children's Unit of the Legal Services Agency. One of our members has experience of the Project for the Registration of Children as British Citizens in London and considers that a Scottish equivalent could usefully be funded, perhaps through the newly established Just Right Scotland.

[5] Other areas of work

[5.1] The Faculty believes that the availability of legal aid in relation to the enforcement of other civil rights and obligations is necessary because not all types of case can be funded through alternative methods and legal aid must fill this gap. For example, speculative fee arrangements cannot easily be accessed by persons finding themselves defending litigation. Pursuers also should be able to bring more difficult cases where the prospects of success are such that it will be difficult to obtain effective representation on a speculative basis and there is no other funding mechanism available, for example serious medical negligence cases. There is a public interest in having legal aid available for the presentation of public law cases where private or speculative funding is not available.

[5.2] The ability of parties with serious legal problems to litigate them at an appropriate level is important not just on the principle of access to justice, but also to support the development of the law through argument of difficult or complex cases at higher levels. Early access to legal advice can help to identify where the problem is one which requires resolution through the courts.