Please send your response by 25 August 2017 to divisions@int-bar.org

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International Bar Association Consultation on Legal Aid Guidelines in Civil, Administrative and Family Justice Systems

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INTRODUCTION

The IBA Bar Issues Commission and the IBA Access to Justice and Legal Aid Committee are collaborating on developing guidance on what works in creating a good legal aid system, and as part of this are holding a consultation on access to legal aid in civil, administrative and family justice systems.
The first step of the process was a very successful Legal Aid Roundtable in conjunction with the Bar Leaders Conference in Belfast at which may bar leaders observed the high quality discussion of many of the world's leading legal aid experts. This consultation document was prepared taking into consideration the findings of the Legal Aid Roundtable and the responses to the consultation will be discussed at a session at the IBA Annual Conference in Sydney in October 2017. We hope the Council of the IBA will adopt the guidance that emerges from the consultation at the Rome Annual Conference in 2018.

We are seeking responses from IBA members and non-members by 25 August 2017 to divisions@int-bar.org.

The aim is to produce a guidance document on the matters that governments could usefully consider when developing or reforming their legal aid systems, with particular reference to civil, administrative and family justice systems, and to offer examples of good practice from around the world. We are not including here criminal justice systems because in December 2012 the United Nations adopted the 'UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', the first international instrument on the right to legal aid.[1]

This consultation document is intended as an issues paper, setting out some preliminary propositions and seeking a wide range of views so that the IBA can bring its experience to bear both organisationally and individually. We are consulting with members and non-members from across the globe so that the resulting guidance document is relevant across jurisdictions. We are particularly interested to receive practical examples from a range of countries.

At earlier stages of developing the consultation document, we found that some participants put in responses to earlier questions that would have better fit with later ones. **We therefore suggest that you read the whole document before starting to respond to it, so as to avoid this problem.**

[1] See https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

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PART A – RESPONDING TO THE CONSULTATION

This consultation document is intended as an issues paper, setting out some preliminary propositions and seeking a wide range of views so that the IBA can bring its experience to bear both organisationally and individually. We are consulting with members and non-members from across the globe so that the resulting guidance document is relevant across jurisdictions. We are particularly interested to receive practical examples from a range of countries.

We are seeking responses from IBA members and non-members by 25 August 2017.

Please complete this document and send it, along with all further documents and information to divisions@int-bar.org.

To start, please indicate:

1. Your name

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2. Organisation
   Faculty of Advocates

---

3. Relevant jurisdiction
   Scotland

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4. Whether you are responding on behalf of a professional body of lawyers.
   Yes

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5. Whether you/your organisation would like to be named in the guidance document. While comments will not be attributed to particular individuals/organisations, you/your organisation might be identifiable from the substance of your comments. So please clearly indicate if you/your organisation wish to remain anonymous.

Happy to be quoted and named. Please note that Scotland has its own separate legal system and our legal aid system is also separate and distinct from others in the UK. There is a perception, which we would endorse, that our system of legal aid is more vibrant than in other parts of the United Kingdom. The Scottish Government is currently undergoing an independent legal aid review. All our responses to the questions in this document should be read against that background.

Your data will not be shared with any persons or third party, and is not used for promotional purposes.

There is no requirement to address all of the propositions in the consultation document. Feel free to address only some of the propositions.

PART B – SHAPING LEGAL AID: AIMS & DEFINITIONS

Legal aid in civil, administrative & family justice systems

In 2012, the UN General Assembly adopted Resolution 67/187 on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Principles and Guidelines on Criminal Legal Aid'). That Resolution recognised that legal aid is "*an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law*".[2]

It is our position that legal aid is also an essential element in a fair, humane and efficient civil, administrative and family justice system that is based on the rule of law. This IBA consultation therefore focuses on access to legal aid in civil, administrative and family justice systems. It is in the spirit of UN Resolution 67/187 and the recognition therein that legal aid is "*an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process*".[3] The Resolution also recognises that the UN Principles and Guidelines on Criminal Legal Aid "*can be applied by Member States, taking into account the great variety of legal systems and socioeconomic conditions in the world*".[4]

We aim to produce a guidance document on principles that should be considered in creating, amending and running legal aid systems in civil, administrative and family law that is also relevant across jurisdictions.

Defining legal aid

We are aware that in some jurisdictions **'legal aid'** includes pro bono activity, public legal education, and the provision of information to the public. While recognising the importance of these activities to the rule of law and access to justice, we are defining 'legal aid', for the purposes of this document, as follows:

- Legal advice, assistance and representation;
- For people or groups who cannot afford to pay privately for legal help;
- Mainly provided by lawyers and paralegals;
- For specific legal problems;
- Funded, in whole or in part, by the state; and
- Including court fee waivers and other financial concessions.

[2] UN General Assembly Resolution 67/187 on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012) at page 2, available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

[3] Principle 1 of the UN Principles and Guidelines on Criminal Legal Aid.

[4] UN General Assembly Resolution 67/187 at page 3.

We are doing so because we consider these to be the core qualities of legal aid.

For the purposes of this document, legal aid refers to both primary and secondary legal aid. (Some jurisdictions distinguish between primary and secondary legal aid. Primary legal aid has been described, for example, as legal support provided by "non-certified" lawyers (for example, paralegals) and which does not include "representation before courts or other activities that may only be performed by certified lawyers".[5])
While for the purposes of this document we define legal aid as *mainly* provided by lawyers and paralegals, we use the broader term **'legal aid provider'** throughout the document in recognition that a wider range of stakeholders can undertake legal aid work. For example, the UN Principles and Guidelines on Criminal Legal Aid provide:

> "*The first providers of legal aid are lawyers, but the Principles and Guidelines also suggest that States involve a wide range of stakeholders as legal aid service providers in the form of non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academia*".[6]

We use the term **'body administering legal aid'** throughout the document. The administration of legal aid includes holding the legal aid budget; making decisions on the grant of legal aid; and paying the legal aid providers who undertake the work. It may also include employing lawyers to provide legal aid services; and allocating cases to legal aid providers.

The term **'professional bodies of lawyers'** is used here to refer to national and international law societies and bar associations.

[5] 'International Study of Primary Legal Aid Systems with the Focus on the Countries of Central and Eastern Europe and CIS' (2012) at page 14, available at http://www.ua.undp.org/content/dam/ukraine/docs/seichasen_4708604._eng-_international_study-_legal_aid_systems.pdf

[6] Para 9 of the UN Principles and Guidelines on Criminal Legal Aid.

PART C – FUNDING, SCOPE & ELIGIBILITY

Part B is concerned with funding, scope and eligibility. The first section 'Funding Legal Aid' looks at the factors that should be considered in setting a legal aid budget (Propositions 1-3). The second section 'The Scope of Legal Aid' considers the factors that should be taken into consideration when deciding on the scope of legal aid (Propositions 4-6) – by 'scope' we mean whether the problem or the type of case, is one for which legal aid is available. Section 3 'Eligibility for Legal Aid' considers the factors that should be considered when deciding on eligibility for legal aid (Propositions 7-11) – here we focus on the situation of the individual (including their financial means and vulnerability) and the merits of the individual's case (including the interests of justice and likelihood of success). Some issues cut across both scope and eligibility for legal aid but have been separated into two sections for practical purposes in this consultation document.

1. Funding legal aid

The costs and benefits of legal aid service delivery

Just as the rule of law is seen as an essential ingredient for economic prosperity, access to justice, including legal aid, should be recognised as an economic benefit. For example, the UN's 2030 Agenda for Sustainable Development states:

> "*We envisage a world … in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger*".[7]

Crucially, the UN Sustainable Development Goals include access to justice and the rule of law. Target 16.3 specifically aims to "*Promote the rule of law at the national and international levels and ensure equal access to justice for all*".[8] It is hoped that Goal 16 will have great relevance for policy-makers in the field of legal aid.

Contrary to the prevailing narrative that legal aid is a drain on limited resources, research shows that provision of access to justice and legal aid can prevent adverse consequences on the health, employment and well-being of individuals and their families.[9] It is for this reason that we suggest that legal aid should be seen as an important element in an integrated justice policy that

[7] 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015) at para 9, available at https://sustainabledevelopment.un.org/post2015/transformingourworld

[8] Ibid at Goal 16 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.

[9] See, for example, 'Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid' (2016) at para 3.1, available at http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/submission-to-the-labour-party-review-of-legal-aid/ See also 'Report of the Deputy Minister Advisory Panel on Criminal Legal Aid' (Canada, 2014) at Annex 3, 'Socio-Economic, Health and Legal Impact of Criminal Legal Aid', available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/rr14/index.html

also includes, for example, preventative action, public legal education and the provision of information to the public. The reference here to preventative action, for example, seeks to recognise that "prevention is better than cure". Over time the costs of the justice system could be reduced if health, education and social support for disadvantaged families were improved.

This link is being recognised in jurisdictions like Australia where there are 'Health Justice Partnerships', collaborations between health and legal organisations. Health Justice Australia explains that "*Adding a lawyer to the healthcare team means that healthcare professionals are more able to spot a legal problem and have someone nearby who can solve it. And because legal problems can affect health, it means patients get better, more holistic healthcare too*".[10]

Working together, they can better identify and respond to the legal and social needs that make it harder to be healthy – and stop their existing problems from reaching crisis point.

There is also a related issue here of the additional costs posed by litigants in person. As Lord Neuberger, President of the UK Supreme Court recently stated:

> "*These changes over the past 20 years in civil and family legal aid have resulted in many people being faced with the unedifying choice of being driven from the courts or having to represent themselves. The substantial increase in litigants in person represent[s] a serious problem for judges, for court staff and for other litigants and their lawyers. A trial or any other hearing involving a litigant in person is likely to last far longer (apparently reliable research suggests three times longer) and involve far more work for, and pressure on, the judge than a trial with legal representatives on both sides, and an inevitable result of longer hearings is delays to other cases. The effect on an undermanned and demoralised court staff of having to deal with more litigants in person can only be imagined*".[11]

The difficulty lies in quantifying the costs and benefits of legal aid services (and in factoring counter-factual scenarios – failing to provide legal aid services – into the budgeting process).

The IBA is collaborating with the World Bank to identify a robust methodology for quantifying the benefits of legal aid to government and to society. There is existing research in this area. For example, PricewaterhouseCoopers (PwC) was engaged by National Legal Aid to estimate the economic benefit of legal aid assistance to the community in Australia.[12] The report concluded that "*Governments have a responsibility to provide access to justice, including access to legal assistance, as part of the provision of basic human rights. Beyond this responsibility there is a strong economic justification for the provision of legal aid on multiple levels*".[13] It also concluded that "*there is a strong economic case for appropriately and adequately funded legal*

[10] See http://www.healthjustice.org.au/hjp/what-is-a-health-justice-partnership/

[11] Lord Neuberger, President of the Supreme Court, Welcome address to Australian Bar Association Biennial Conference (3 July 2017) at para 11, available at https://www.supremecourt.uk/docs/speech-170703.pdf

[12] PwC 'Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law' (2009) at page i, available at: http://www.nationallegalaid.org/assets/General-Policies-and-Papers/Economic-Value-of-Legal-Aid-6-Nov-2009.pdf

[13] Ibid at page ix.

aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government".[14]

As part of the process of estimating the costs and benefits of legal aid services, it will be important to understand the impact of legislative and policy proposals on the justice system.

For example, in the UK, the 'Justice Impact Test' is a mandatory impact test, which considers the impact of policy and legislative proposals on the justice system.[15] It is described in guidance as a "*tool that helps policy-makers across government find the best way of achieving their policy aims whilst minimising the impact on the justice system*".[16] It assesses policy proposals from government departments in order to "*identify, quantify and cost their impacts on the civil and criminal justice system and covers: Legal aid; Courts, tribunals and the judiciary; Prosecuting bodies; Prisons and probation services; [and] Youth justice services*".[17]

Proposition 1: Legal aid service delivery generates significant social and economic benefits. In the budget formulation process governments should estimate the social and economic costs and benefits of legal aid service delivery, including by taking into account the social and economic costs of failure to deliver services.

Consultation Questions:

1. Do you agree with Proposition 1?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

[14] Ibid at pages ix-x.
[15] See https://www.gov.uk/government/publications/justice-impact-test
[16] Ministry of Justice, 'Justice Impact Test: Guidance' (2016) at page 3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564734/justice-impact-test-guidance.pdf
[17] Ibid at page 3.

2. In response to this question, we would value views on:

a) Whether social and economic impact assessments of legal aid service delivery should be mandatory.

We are uncertain as to who might make such assessments. There is a danger of 'technicalising' issues that are more healthily the subject of democratic discussion and debate. In our small jurisdiction wherein legal aid is an entirely devolved matter and wholly subject to the Scottish Parliament, satisfactory assessment of social and economic impacts should take place through the legislative process.

b) Whether legal aid impact assessments of new legislative and policy proposals should be mandatory.

We agree that it is desirable that the impact on legal aid of new legislative and policy proposals should be considered. We have experience in the past of legislative change in both the criminal and civil context being introduced without corresponding changes in the availability of legal aid, causing difficulties to the public and dilemma for lawyers. It should not however be necessary to make this a mandatory consideration in every case, when, logically, it is so appropriate. In Scotland such an assessment should form part of a business and regulatory impact assessment (BRIA) which is required for all policy changes and legislation with an impact on business.

c) Whether such impact assessments should be fully funded.

In Scotland such assessments should be carried out by the Scottish Government, or agents of the Scottish Parliament.

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3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Programmes which demonstrate the social and economic benefits of legal aid (similar to Australia's Health Justice Partnerships).

We know of no such programmes. There was research on access to justice generally reported in **Paths to justice Scotland : what people in Scotland think and do about going to law . /** Genn, Hazel; Paterson, Alan. Oxford, 2001. More recent work has tended to be viewed from the "provider" perspective, see *eg* **A Sustainable Future for Legal Aid,** Scottish Government, 2011, available at http://www.gov.scot/Resource/Doc/359686/0121521.pdf .

b) Research or measurement frameworks which consider the costs and benefits of legal aid services (similar to the PwC Australia report) or the *failure* to deliver such services.

No such framework exists in Scotland

c) Legal aid impact assessments (similar to the UK's Justice Impact Test).

Here, we are interested in both the systemic effects of the availability of legal aid and the individual case effects.

There are none that we know of.

Setting the legal aid budget

Governments have a responsibility to provide access to justice. Policymakers should consider options and scenarios that are fully thought through and costed in order to make informed decisions. This proposition seeks to emphasise that policymakers setting the legal aid budget should be properly informed by evidence from a range of stakeholders, including professional

bodies of lawyers and user organisations; and that the body administering legal aid has a central role to play in this process.

A recent World Bank report estimates the costs of providing primary and secondary free legal aid services in Serbia.[18] It explains:

> "*A major element in the design of a legal aid system is its fiscal viability. This requires that important decisions be made regarding the scale and scope of public access to legal aid. That is, critical decisions include the definition of the population eligible for legal aid and the scope of legal services to which they will be entitled. Beyond this, consideration must be given to alternative vehicles for delivering such services… Effective legal aid systems often use a combination of these vehicles*".[19]

In concluding, the report noted that "*Following the passage of the Draft Law, many choices remain to be made for the implementation of the FLA system, via regulations and policy. This fiscal impact analysis provides information and analysis to inform those choices. This fiscal impact analysis can also be built on to advise at a more granular level the likely impacts of a range of those choices*".[20]

Proposition 2(a): Setting the legal aid budget is a political decision. However it needs to be adequate to support the services the executive and legislature have agreed should be funded and needs to provide fair remuneration for those who do the work. **2(b):** It also needs to be informed by evidence from the academic, professional and policy communities. The body administering legal aid should be responsible for gathering this information.

Consultation Questions:

1. Do you agree with Proposition 2?

☐ Yes

☐ No

If not, please explain and/or suggest alternatives.
We do not consider this question well framed for the Scottish context. We do not have a capped legal aid budget in Scotland, rather we have rationing by reference to the nature of the assistance required, means-testing of service users and a crude form of merits testing by lawyers. Some degree of input from academic, professional and policy communities plays a role in the legislative processes that lead to formulation of the statutory criteria for the means

[18] 'Serbian Free Legal Aid Fiscal Impact Analysis: Volume, Costs and Alternatives' (2013) at page 1, available at http://documents.worldbank.org/curated/en/253271468304781154/World-Bank-Multi-Donor-Trust-Fund-for-justice-sector-support-Serbian-free-legal-aid-fiscal-impact-analysis-volume-costs-and-alternatives

[19] Ibid at page 1.

[20] Ibid at page 53.

testing and merits assessment.

2. In response to this question, we would value views on:

a) Whether the body administering legal aid should have this information-gathering role.

As noted above, we consider the current legislative processes for marrying legal aid provision to legal aid need are on the whole adequate for our small jurisdiction, subject to a need to be more responsive to novel legal situations and to legislative changes.

b) Whether the body administering legal aid should have within it a distinct unit tasked with policy and evidence issues.

We understand that the Scottish Legal Aid Board does have one or more officers tasked with policy development. In our interactions with such officials we have generally been impressed by their grasp of the relevant issues.

c) How situations where the body administering legal aid is part of government should be reflected here, particularly in respect of fair remuneration. For example, whether appropriate rates of pay should be independently evaluated.

There is a tension here that needs to be held in balance. It is our view that as regards civil practice, legal aid must not be viewed in isolation from the wider ecology of judicial cost recovery, a point we develop below. There is a widespread sense in Scotland that the rates payable to practitioners have fallen behind the rate of fair remuneration, although this is more acute in the sphere of criminal practice due to the impracticability of cross-subsidising from private work and from judicially recovered expenses. An independent evaluation would be welcomed.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Fiscal impact analysis frameworks (similar to the Serbia example).

None we are aware of in Scotland.

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Legal aid and pro bono legal services

This proposition addresses the relationship between legal aid and pro bono legal services.

In many jurisdictions, pro bono activities have a long and honoured place in the traditions and ethos of the legal profession, and are seen as essential to increasing access to justice for the poor and vulnerable. Furthermore, pro bono activities are compulsory in some jurisdictions. For example, since January 2015 applicants for admission to the New York State Bar must complete 50 hours of pro bono services.[21] In other countries, there are voluntary contributions towards pro bono work. For example, the Bar Council of England and Wales uses the opportunity of the practice certificate renewal process to ask for a £30 contribution towards the work of the Pro Bono Unit, an independent charity (and, in fact, it has set this fee to be added by default).[22]

However, governments should not regard pro bono activities as an adequate substitute for a properly funded legal aid system. In this regard, it is important to recognise that pro bono activities often include work that is not usually covered by legal aid – for example, transactional work for charities and NGOs, capacity building in developing countries etc. Moreover, pro bono activities can introduce an element of arbitrariness into access to justice – where lawyers choose which clients and cases to take forward. A lack of transparency may also result in discrimination against certain groups.

This proposition therefore seeks to recognise the important role played by pro bono activities whilst recalling and making clear the responsibility of governments to provide access to justice.

This is reflected in the IBA's 2008 Pro Bono Declaration, which urges governments to "*allocate sufficient resources to make legal aid available to meet the critical legal needs of the poor, underprivileged and marginalized and not to use pro bono legal service as an excuse for reducing publicly funded legal aid*".[23] The Declaration acknowledges however, that "*the delivery of pro bono service by the legal profession is of vital public and professional interest and helps to fulfil the unmet legal needs of the poor, underprivileged, and marginalized and restore public confidence in the efficacy of governmental and judicial institution*".[24]

For the purposes of this document, we adopt the definition of 'pro bono legal service' as set out in the IBA Declaration. The Declaration defines pro bono legal service as "*work by a lawyer of a quality equal to that afforded to paying clients, without remuneration or expectation of remuneration, and principally to benefit poor, underprivileged or marginalized persons or communities or the organizations that assist them*".[25]

The Declaration considers that pro bono legal service may extend to:

[21] See http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml
[22] See https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/practising-certificate/
[23] IBA Pro Bono Declaration (2008), at para (g), available at https://www.internationalprobono.com/declarations/
[24] Ibid, at para (i).
[25] Ibid, at para 1.

- *Advice to or representation of persons, communities or organizations, who otherwise could not exercise or assert their rights or obtain access to justice;*
- *Activities supporting the administration of justice, institution building or strengthening;*
- *Assisting bar associations and civic, cultural, educational and other non-governmental institutions serving the public interest that otherwise cannot obtain effective advice or representation;*
- *Assisting with the drafting of legislation or participating in trial observations, election monitoring, and similar processes where public confidence in legislative, judicial and electoral systems may be at risk;*
- *Providing legal training and support through mentoring, project management and exchanging information resources; and also*
- *Other similar activities to preserve the Rule of Law.*[26]

Proposition 3: Professional bodies of lawyers should seek to maximise the ways in which their members can provide pro bono legal services in accordance with their culture and traditions, but governments cannot rely on this to cover services which should properly be funded by legal aid.

Consultation Questions:

1. Do you agree with Proposition 3?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. In response to this question, we would value views on:

[26] Ibid, at para 1.

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a) Whether pro bono legal services should be mandatory to address funding gaps and the need for free legal advice.

We respectfully suggest that "plugging the funding gap" is absolutely the worst possible reason to provide pro bono legal services. We do however support the availability of pro bono services as a safety net for legal assistance in exceptional circumstances.

b) Whether law students should be required to complete a certain number of pro bono hours before qualifying.

No. Scotland's universities have been at the forefront of the development of Law Clinics, and our Law Centres provide an opportunity for volunteering. We can vouch from our own experience for the extraordinary developmental value of such programmes. We think that would inevitably be marred if students' contribution was compelled. We are mindful also that nowadays many students have to work in order to survive, and need to direct their time away from study to keeping a roof over their heads. Some students also are bringing up children. That all said, the Faculty of Advocates does expect its devils (trainees) to undertake a certain amount of pro bono work, and they do.

c) Whether there should be a compulsory pro bono requirement for practising lawyers.

Most lawyers in Scotland who practise in the representation of clients rather than in transactions with other lawyers necessarily involve themselves in a certain degree of pro bono work. For example, a social security appeal is heard in a higher court where legal aid is available but remitted for final disposal to a lower tribunal where it is not; the lawyers involved in the legally aided stage would appear as a matter of course at the non-legally aided stage. Such involvement is in our view best left to the discretion of the lawyer; we do not understand to there be any experience of problems as a result. So far as transactional lawyers are concerned, whilst at first one can see the attraction of 'conscripting' them to do their part, the reality is that the need for pro bono work arises in fields of practice with which they are not familiar. 'Dabbling' is never in anyone's interests. So, no.

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d) How situations where legal aid services are provided by mandatory pro bono activities should be reflected in this proposition.

We do not support the mandatory provision of pro bono legal services. The quality of provision of pro bono services tends to stem from the personal commitment of the volunteer.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Compulsory pro bono programmes in other jurisdictions (similar to the New York State Bar).

The Faculty of Advocates has a Free Legal Services Unit which has been involved in a number of ground breaking cases. We consider that it is a model of how to provide pro bono legal services.

Further information can be found online at:
http://www.advocates.org.uk/instructing-advocates/free-legal-services-unit/free-legal-services-unit-homepage

2. The scope of legal aid

Criteria on the scope of legal aid

By 'scope' we mean whether the problem or the type of case, is one for which legal aid is available. Types of case for which legal aid may or may not be available in a civil, administrative and family law context include, for example, community care, debt, domestic abuse, discrimination, employment, housing, and welfare benefits. By way of illustration about how scope can be limited within types of case, a person may for example usually only get legal aid for advice about clinical negligence if their case relates to their child suffering a brain injury during pregnancy, birth or in the first 8 weeks of life. Similarly, legal aid may not usually available be for advice about personal injury, other than in exceptional cases.[27]

This proposition suggests that criteria should be drawn up to allow principled decisions on scope and eligibility for legal aid to be made in civil, administrative and family cases. It suggests this should be done by government in consultation with other stakeholders.

Examples of issues that might be covered by such criteria include the type of case/legal problem, the complexity of the case, whether the need for legal support is urgent, the consequences of failing to provide legal aid, and whether the claimant is a child etc. In the criminal justice sphere, Principle 3 (on legal aid for persons suspected of or charged with a criminal offence) of the UN Principles and Guidelines on Criminal Legal Aid attempts to capture some of these issues.

So, while the content of the criteria may vary and needs careful consideration, this proposition seeks to emphasise the need for certainty and principled guidance about scope and eligibility for legal aid in civil, administrative and family cases.

Proposition 4: There should be clear, transparent and published criteria on scope and eligibility for legal aid in civil, administrative and family law matters. These criteria should be drawn up by government in consultation with other stakeholders.

Consultation Question:

1. Do you agree with Proposition 4?

☒ Yes

☐ No

[27] These examples reflect the position in England & Wales: https://checklegalaid.service.gov.uk/ and see also e.g., https://www.gov.uk/guidance/work-out-who-qualifies-for-civil-legal-aid.

If not, please explain and/or suggest alternatives.
Our 'yes' is qualified. We consider we do have in Scotland already a system for the provision of legal aid which meets the criteria set out above. We would note that whilst such clarity serves transparency, we have experienced in our own practices a slight tendency toward ossification, such that developments in legal practice, judicial structure, and societal need, are only slowly caught by the legal aid authorities here. We acknowledge a tension between clarity and flexibility.

Court fee waivers

Court fee waivers should be considered a form of legal aid and should be available even when a case is not within the scope of legal aid if the client would have been financially eligible for legal aid had the case been within scope – otherwise it could effectively deny the individual their right to resolution of their dispute.

Some would go further. A recent report on court fee waivers in the Republic of Serbia, for example, concluded by noting some preconditions for reform of the system of court fees in Serbia which included assessing the impact of the new Law on Free Legal Aid.[28] This was because "*it is necessary to harmonize the conditions for exercising the right to free legal aid with the conditions for exemption from payment of court fees*".[29] It explained that:

> "*If a citizen realizes the right to free legal aid, it is necessary to include in this right the exemption from payment of court fees as well. … At the same time, some citizens may not be eligible for free legal aid, due to a slightly better economic position, but they also could be covered by exemption from payment of court fees, if that would facilitate their easier access to the court system*".[30]

Proposition 5: Court fee waivers should be seen as a form of legal aid. Where legal aid is granted, all court fees should be automatically waived without the need to complete an additional application process. Where a case is not within the scope of legal aid, but the client would have been financially eligible for legal aid had the case been within scope, court fees waivers should be available.

Consultation Questions:

1. Do you agree with Proposition 5?

[28] 'Analysis: Court Fee Waiver System in the Republic of Serbia' (2016) at page 39, available at http://www.mdtfjss.org.rs/en/mdtf_activities/2016/report-from-the-presentation-of-the-analysis-of-court-fee-waiver-system-in-serbia-september-6-2016#.WVDHauvyuCp
[29] Ibid at page 40.
[30] Ibid at page 40.

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.
While we agree with the propositions, there is more fundamental point in Scotland about which we hold emphatic views arising from the level of fees themselves. In the Court of Session at first instance fees payable by each party are set at £200 per half hour per case. That is £2,000 per 5 hour day. On appeal the fee payable by each party is £500 per half hour (£4,500 for a 4.5 hour day). The average monthly salary in Scotland is £2,300. The fees are a barrier to justice. They represent a serious disincentive to anyone in seeking access to justice, including public authorities seeking orders in the interests of children. They alter the persective of the judicial system from one that serves citizens to one providing for customers. Persons receiving legal aid are exempt from these charges but their introduction precludes the provision of legal services on speculative or no-win-no-fee arrangements.

The malign effect of excesive court fees was addressed by the UK Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

2. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Practice on this issue from a range of jurisdictions.
We are aware of a number of difficult situations in this jurisdiction relating to court fees, particularly in cases where a number of actions are heard together and a fee is charged for each action. For example in a recent case involving four children and accordingly four petitions the court proposed to charge the petitioner £8,000 per day. In another case involving 17 related actions a short hearing in the Inner House (appeal court) lasted 35 minutes and the petitioners were charged a total fee of £17,000. In both cases the fees had to be financed by local authority council tax payers.

b) Court fees being waived on grounds other than financial means.

We have made clear our opposition to court fees on principle. We would suggest that if they are not to be abolished lock, stock and barrel, or at least reduced by an order of magnitude, they should not, in particular, be levied in questions between the subject and the state.

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Mandatory legal representation

This proposition is aimed at situations where an individual requires legal representation in order to get access to legal services, courts and tribunals. It suggests that the state has a duty to ensure individuals are represented by competent lawyers in such situations, even where they lack the financial means to pay for such representation themselves.

For example, a recent report by The Hague Institute for Innovation of Law notes that "*For some legal services, and in some countries, assistance by a qualified lawyer is mandatory. In order to guarantee access to justice in such cases for people with limited means, it is often necessary that citizens have recourse to state funded legal aid in these areas*".[31] It also highlights that "*Most countries allow people to bring cases before specialised tribunals (employment, social security) without being represented by a lawyer*" but that "*Many restrictions exist, however, in respect to procedures at courts*" and that "*Generally, access to higher courts (appeal, supreme courts) can only be obtained with the assistance of a lawyer*".[32]

Proposition 6: Where legal representation is mandatory to access legal services, courts and tribunals, the state has a duty to ensure that individuals without the financial means to pay for a lawyer themselves are represented by competent lawyers.

Consultation Questions:

1. Do you agree with Proposition 6?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

[31] HiiL, 'Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?' (2014) at page 26, available at http://www.hiil.org/publication/legal-aid-europe-nine-different-ways-guarantee-access-to-justice

[32] Ibid, at page 26.

2. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Legal services, courts and tribunals where legal representation is mandatory.

At present it is only in the criminal courts that legal representation may be mandatory. This occurs under section 288C of the Criminal Procedure (Scotland) Act 1995, when a person is charged with certain sexual offences and crimes such as stalking. That person may not conduct his or her own defence. The Scottish Government is currently undertaking a review to determine whether that principle should be extended to civil cases, and in particular public law cases relating to protection of children where certain allegations are made against parents.

b) Practice on this issue from a range of jurisdictions and how subsidised legal assistance from a lawyer is provided in these situations.

Legal aid is available for an accused person in criminal cases. The Faculty of Advocates responded to a consultation exercise in relation to the proposal in the civil context pointing out that legal aid would have to be made available there too.

c) Situations where 'sufficient merit', 'likelihood of success' or similar criteria are applied in such circumstances.

Such criteria are obviously entirely inapplicable in the criminal context, where the subject has a right to be defended against the state. It is the Faculty's position that where legal representation is mandatory there should always be automatic legal aid.

3. Eligibility for legal aid

This section considers eligibility for legal aid. Propositions 7-8 focus on the situation of the individual (including their financial means and vulnerability). Propositions 9-10 consider the merits of the individual's case (including the interests of justice and likelihood of success).

The principle of non-discrimination

UN Principles and Guidelines on Criminal Legal Aid, Principle 6 (on non-discrimination) provides "*States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status*". This proposition seeks to extend this principle to civil, administrative and family legal aid.

The reference in the proposition to adapting this to take account of 'relevant scope and eligibility criteria' is an acknowledgement that legal aid policy can prioritise certain areas of law and the needs of certain groups based on objective grounds – however, within the boundaries of scope and eligibility, all must be treated equally.

For example, in England & Wales, in the criminal justice sphere you have the right to free legal advice if you are questioned at a police station; and in the civil justice system, financial situation is not taken into account for cases about mental health tribunals, children in care, and child abduction for example.[33]

Proposition 7: Principle 6 of the UN Principles and Guidelines on Criminal Legal Aid should apply, adapted to take account of relevant scope and eligibility criteria.

Consultation Questions:

1. Do you agree with Proposition 7?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

[33] See https://www.gov.uk/legal-aid/eligibility

2. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Areas of law and/or groups prioritised for legal aid on grounds other than financial means.

Automatic non-means tested legal aid is given to persons seeking the return of children under the Hague Convention on the Civil Aspects of International Child Abduction. Unfortunately the same does not apply to those resisting the return of children under the same Convention, resulting in unequal treatment.

Financial means and vulnerability

This proposition seeks to emphasise that while relevant, financial means should not be the only eligibility criterion for legal aid and that vulnerability is a particularly important factor.

We would highlight here that vulnerability can be personal (for example, learning disabilities, mental health issues or young age) or situational (for example, being homeless, being a survivor of domestic abuse or having recently left care).

In reality, the financial means threshold to qualify for legal aid is set so high in some jurisdictions that many people who do not qualify for legal aid on financial grounds, in practice cannot afford legal help or representation.

It is also worth highlighting here that other factors can also impact on affordability – for example the ability to afford (full) legal costs is significantly impacted by the duration of court proceedings.

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Proposition 8: Financial means is a relevant criterion when assessing eligibility for legal aid. Vulnerability, including lack of knowledge or ability to enforce legal rights without expert help, is also a relevant factor.

Consultation Questions:

1. Do you agree with Proposition 8?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. In response to this question, we would value views on:

a) Whether this proposition should be revised to provide that eligibility tests should assess whether individuals would be unable to access legal services for financial or other reasons such as vulnerability.

We consider that the present arrangements in Scotland in which legal aid is provided to a financially eligible applicant according to a balancing of the criteria of reasonableness and prospects of success, and which is underpinned by detailed guidance in the handbooks published by the Scottish Legal Aid Board, work reasonably well. The legal aid handbooks are available online at:

http://www.slab.org.uk/providers/handbooks/

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3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) The different vulnerabilities recognised in a range of jurisdictions.

Merits – the interests of justice and the likelihood of success

Proposition 9 provides that the interests of justice and the likelihood of success are also relevant to eligibility for legal aid. It considers the 'interests of justice' in some detail and notes that this will be affected by the importance of the matter to the individual – considered objectively – and the importance of the matter to others in society, particularly disadvantaged groups, as well as the complexity of the matter and the availability of satisfactory alternative methods of achieving justice, including alternative funding. The reference to 'alternative funding', for example, seeks to recognise that in some countries legal expenses insurance is a usual element of household policies and in many countries trade unions provide legal services to their members. Provided they are of sufficient quality, access to these services can justify the refusal of legal aid.

It is worth noting here that, in England and Wales in the criminal justice sphere, as part of the 'interests of justice' test, which determines whether an individual is entitled to legal aid based on merits, the 'Widgery criteria' must be considered.[34] These criteria include, among other things, whether it is likely the individual will lose their liberty; whether a substantial question of law may be involved; whether it is likely that the individual will lose their livelihood; and whether the proceedings may involve expert cross-examination of a prosecution witness.[35]

Proposition 9 also considers the 'likelihood of success'. The key consideration here is whether public money should be spent on claims that, while not frivolous or vexatious, have a poor prospect of success. Proposition 9 emphasises that we have to balance the prospects of success with other relevant criteria including the importance of the matter to the individual and to the wider public. It is important to consider here that (incorrectly) pre-empting the result of litigation could deprive individuals of access to justice which others, who can afford to pay their own legal costs, could pursue. Equally, where resources for legal aid are limited, if the likelihood of success is not considered, meritorious cases may not get funding – and sometimes, for example, a relatively small claim can be very important to the individual because of their circumstances.

[34] See https://www.gov.uk/guidance/work-out-who-qualifies-for-criminal-legal-aid.
[35] Ibid.

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It is also important to note that in some jurisdictions the losing party, even where they are legally aided, may have to pay at least part of the winning side's costs, so the likelihood of success becomes a very significant factor for claimants.[36]

Proposition 10 suggests that the 'interests of justice' is more important than the 'likelihood of success' in civil, administrative and family legal aid. It also suggests that the prospects of success will often not be relevant in family law matters, where for example the best interests of the child are paramount.

Proposition 9: The following criteria are relevant to eligibility for legal aid: (a) The interests of justice (which, in turn will be affected by the importance of the matter to the individual – considered objectively – and the importance of the matter to others in society, particularly disadvantaged groups, as well as the complexity of the matter and the availability of satisfactory alternative methods of achieving justice, including alternative funding); and (b) The likelihood of success.

Proposition 10: The 'interests of justice' is a more important eligibility criterion than the 'likelihood of success' in civil, administrative and family legal aid. In family law matters, the prospects of success will often not be relevant.

Consultation Questions:

1. Do you agree with Propositions 9-10?

☐ Yes

☒ No

If not, please explain and/or suggest alternatives.
We do not favour any fixed order of priorities. Legal aid has been made available on a number of occasions because an official charged with determining whether to fund a particular litigation has been impressed by the boldness or originality of a proposed claim. At the same time too unbridled an imagination can lead to an unarguable waste of public money. We see no alternative to leaving these matters in the messy arena of discretion, if the values of prudence and innovation are to be appropriately balanced.

[36] See more generally, for example, UK Supreme Court Practice Direction 13 on costs orders against legally aided parties, available at https://www.supremecourt.uk/procedures/practice-direction-13.html#04

2. In response to this question, we would value views on:

a) Whether the principle of 'equality of arms' should be added here.

Yes

b) Whether strategic or public interest litigation (where the likelihood of success can be difficult to assess) should be funded by legal aid.

Both strategic and public interest litigation should be supported by legal aid. There is an emerging interest in strategic litigation to develop important legal principles, such as sibling contact between children accommodated by local authorities. Such litigation requires to be funded and cannot be paid for by those involved.

In Scotland we have had recent positive experiences of the effects of strategic interventions in public interests cases, both by CLAN Child Law on behalf of children. They intervened successfully in the UK Supreme Court in *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 (in relation to data protection rights of children and families) and in *AB v H M Advocate* [2017] UKSC 25, 2017 SLT 401 (proportionality of withdrawal of defence of reasonable belief about age of person with whom engaging in sexual activity, on basis of previous allegations when accused a child). There is potential to develop the law in similar cases, subject to the availability of funding.

c) Whether the 'availability of satisfactory alternative methods of achieving justice' should be included here. For example, whether there should be a requirement, where appropriate, for mediation to have been attempted before legal aid will granted for litigation.

There should not be a requirement for alternative dispute resolution before legal aid is available. Legal aid should be available for alternative dispute resolution itself, in those cases where this is appropriate.
It should however be recognised that in some areas alternative dispute resolution in general

and mediation in particular is not appropriate. In family cases where there has been domestic abuse forcing parties to go to mediation may be entirely inappropriate. There are areas of law, such as social welfare law, where mediation would be difficult and there is no scope for mediation in criminal law.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

   a) How the 'interests of justice' and 'likelihood of success' criteria are applied in a range of jurisdictions.

We would refer to the Civil Legal Aid Handbook, Part 4 and para 3.23.

   b) Practice on this issue from a range of jurisdictions including other eligibility criteria.

General eligibility for initial advice

Proposition 11: General eligibility for initial advice should be available when there are no other satisfactory sources for this advice.

Consultation Question:

4. Do you agree with Proposition 11?

☐ Yes

☒ No

If not, please explain and/or suggest alternatives.

The proposition is too sweeping. It should not be necessary to show that there is no other satisfactory source of advice, but merely that the initial advice is required and can reasonably be sought from a solicitor. The criteria for initial advice in Scotland are clear and work well. They replace a scheme that was open to abuse when the criteria was less clearly enunciated.

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PART D – THE ADMINISTRATION OF LEGAL AID

Part D is concerned with the administration of legal aid. The first section 'The Administration of Legal Aid' focuses on how legal aid should be administered and the role (if any) of other stakeholders, in particular professional bodies of lawyers (Propositions 12-15). The second section 'Avoiding Corruption and Favouritism in the Legal Aid System' looks in more detail at the procedure for the grant of legal aid and the allocation of cases (Propositions 16-20).

1. The administration of legal aid

Independence of the body administering legal aid

These two propositions are aimed at ensuring that the interests of the client and society are placed at the forefront in the administration of legal aid, rather than the interests of other stakeholders such as the government or the legal profession. Conscious or unconscious bias may influence decisions on the allocation of work, for example, if other stakeholders are responsible for these decisions. The central question here is whether bodies administering legal aid should consult with other stakeholders and to what extent – and whether, in the case of the legal profession, this should be done at the level of individual lawyers or with representatives of professional bodies of lawyers.

Proposition 12: The body administering legal aid must be operationally independent of government, subject to its accountability obligations.

Proposition 13: The body administering legal aid should consult with professional bodies of lawyers, to benefit from their relevant expertise. The risk of conflicts of interest will generally preclude professional bodies of lawyers controlling legal aid.

Consultation Questions:

1. Do you agree with Propositions 12-13?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.
We should caveat our response by explaining that in Scotland there is no cap on legal aid. This is made possible by the close relationship between the Scottish Government and the Scottish Legal Aid Board. We understand that the alternative would be for a set budget (capping legal aid) being handed to a Board which then had greater independence.

2. In response to this question, we would value views on:

a) What role, if any, professional bodies of lawyers should have in the administration of legal aid.

Both branches of the Scottish profession (i.e. solicitors and advocates) are represented in the membership of the Scottish Legal Aid Board. There is scope for wider liaison with the profession to deal with day to day operational issues.

b) Whether professional bodies of lawyers should have any influence on individual decisions about the grant of legal aid or the allocation of work to specific providers; and whether they should have a role in identifying relevant criteria in this regard.

We are unsure of the focus of this question. Decisions in individual cases relate only to the case in question and the issues are generally confidential. They are not as such open to wider consideration by professional bodies. This may be because in our system the client approaches the solicitor, who then applies for legal aid. The initial approach is not made to the Scottish Legal Aid Board. The Board has no responsibility for allocation of cases. We consider this the correct approach.

c) If lawyers are to have a role in any internal decision-making or appeal process, whether those lawyers should be nominated by the professional body of lawyers, or whether a different mechanism should apply (such as open competition using published and agreed criteria).

The Scottish Legal Aid Board is staffed largely by experienced and knowledgeable officers and our anecdotal impression is that they generally approach issues of provision of public funding professionally, albeit there is a general sense that they are sometimes overprotective of the public funds. It is however incumbent upon lawyers seeking legal aid on behalf of clients to equip the Board's decision-makers in realtion to each application. That process can take time and engender frustration. It is possible both to ask for a review of refusal of legal aid, and as a last resort to seek judicial review of a refusal.

In the case of appeals to the Supreme Court, which involve exceptional expense, the Board do involve external referees from the legal profession to advise.

d) Whether it is legitimate/good practice for bodies administering legal aid to rely on accreditation/quality assurance schemes produced by professional bodies of lawyers as an eligibility criterion for legal aid providers to get legal aid work.

Yes. The Faculty of Advocates is recognised for its rigorous training and all advocates are required to undertake a significant volume of Continuing Professional Development during the practice year. In recent years the Faculty has commenced a Quality Assurance programme for practising counsel.

e) Whether professional bodies of lawyers should have a greater role in the administration of legal aid in countries where much of the funding for legal aid comes from lawyers themselves.

Not applicable in Scotland.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) How the relationship between the body administering legal aid and government operates in other jurisdictions and examples of different forms of independence; and the advantages and disadvantages of the approach taken.

The Scottish Legal Aid Board is a quasi autonomous governmental organisation. Its budget comes from the Scottish Government but it often funds litigation against the Scottish Government. We are aware of no instance in which the fact that the proposed litigation affected the Scottish Government affected the provision of funding in any way.

b) The role played by the legal profession in the administration of legal aid in other jurisdictions (including whether this is at the level of individual lawyers or representatives of professional bodies of lawyers); and the advantages and disadvantages of the approach taken.

We have no relevant experience to answer this question.

Accountability of the body administering legal aid

As discussed above, the body administering legal aid should be independent of government. However, it should be answerable to its sponsoring ministry for the quality of the service the ministry has funded (i.e., value for money) as the government is responsible for providing access to justice. The body administering legal aid should also answer to parliament, which has a public audit function.

It is important to distinguish here between the individual legal aid provider and the body administering legal aid; and between the quality of individual service and the quality of the wider legal aid system.

This proposition is focused on the administration of legal aid and the quality of the legal aid system as a whole. Whereas Part E below will address in detail the provision of legal aid, including questions of professional standards and quality of individual service; and the issue of the accountability of the individual provider to the client. A principal-agent problem may arise if individual providers feel more answerable to the state, than to their clients, who often have limited options, are more vulnerable than the state, and have the most to lose from poor quality service.

Proposition 14: The body administering legal aid must be legally answerable for the quality of the service it administers. It must answer to the sponsoring ministry which provides its funding, but also to parliament, as the representatives of the people who pay for, and benefit from, legal aid.

Consultation Questions:

1. Do you agree with Proposition 14?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. We would be interested to receive examples of:

a) Practice on this issue from a range of jurisdictions.

Decisions of the Scottish Legal Aid Board can be challenged in the Scottish courts by way first of all of appeal to the Sheriff and then if need be by judicial review in the Court of Session. The most prominent decision in that line is *McAllister v Scottish Legal Aid Board* [2010] CSOH 112, 2011 SLT 163 (challenge of refusal to sanction employment of junior counsel). See also *M v Scottish Legal Aid Board* [2011] CSOH 134, 2012 SLT 354 (successful challenge of refusal of legal aid for expert report on the grounds that this did not in the circumstances fall within the legal aid scheme). Challenges of this kind, though relatively rare, have been successful in altering and informing the practice of the Board.

Monitoring and evaluation role of the body administering legal aid

This proposition suggests that, given its independence, the body administering legal aid is well placed to provide information to government, parliament and the public about the operation of the justice system as a whole. As an integral stakeholder in the justice system, the body administering legal aid is well situated to play a key role in monitoring and evaluation, and to identify opportunities and challenges which may in turn impact on legal aid policy.

The focus here is on the justice system as a whole whereas Part E below will consider monitoring and evaluation in relation to individual case files. There is some overlap here with Proposition 1 on the costs and benefits of legal aid service delivery; impact assessments of legal aid service delivery; and legal aid impact assessments of new legislative and policy proposals. There is also some overlap with Proposition 2 on setting the legal aid budget; the need for policymakers to be properly informed by evidence from a range of stakeholders; and the role of the body administering legal aid in this process.

Proposition 15: The body administering legal aid – as with other groups and bodies involved in the justice system – has an important role to play in providing information to government, parliament and the public that will assist in ensuring the efficiency of the justice system as a whole. This includes information on where the system is failing to provide access to justice.

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Consultation Questions:

1. Do you agree with Proposition 15?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. We would be interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Practice on this issue from a range of jurisdictions.

This is again an area where we think there has been innovative practice by the Scottish Legal Aid Board. The Board has kept under review the development of areas of unmet legal need and has from time to time stepped in to make direct provision of appropriate legal services. Helpdesks have been provided by the Board through Law Centres in the courts where tenants face eviction. We are aware of impressive innovation in the field of public defenders (PDSO – Public Defence Solicitors' Office) and in the field of civil law where there is a scarcity of private provision (CLAO – Civil Legal Assistance Offices). We consider that the Board is to be much commended for such innovations and to be encouraged to enlarge upon them.

b) Monitoring and evaluation frameworks or metrics for legal aid policy.

No comment

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2. Avoiding corruption & favouritism in the legal aid system

This proposition seeks to extend UN Principles and Guidelines on Criminal Legal Aid, Principle 9 (on remedies and safeguards) and Principle 12 (on independence and protection of legal aid providers) to civil, administrative and family legal aid.

UN Principle 9 provides "*States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid*".

UN Principle 12 provides:

> "*States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics*".

Proposition 16: Principles 9 and 12 of the UN Principles and Guidelines on Criminal Legal Aid should apply to all legal aid areas, including civil, administrative and family legal aid.

Consultation Question:

1. Do you agree with Proposition 16?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

This is an area where the Scottish legal aid system generally works well.

Decisions on the grant of legal aid and the allocation of cases

These three propositions are focused on the criteria and procedure for the grant of legal aid and the allocation of cases, and on preventing interference in legal aid decisions. The role (if any) of professional bodies of lawyers in the administration of legal aid (including the grant of legal aid and the allocation of work) is discussed in more detail in Part D. There is also some overlap here with Part C, which considers the scope of legal aid and eligibility for legal aid.

In this context, we note that appearances can also be important to building trust – not only must justice be done; it must also be seen to be done. For example, in England and Wales, the Legal Aid Agency (which provides civil and criminal legal aid and advice) is an executive agency, sponsored by the Ministry of Justice.[37]

Proposition 17: The criteria and procedure for the grant of legal aid should be clear, transparent and published. Opponents in a case where someone has applied for legal aid have the right to make representations to the body administering legal aid. However, decisions must be made independently and in accordance with the published criteria and procedure.

Proposition 18: The criteria and procedure for the allocation of cases to legal aid providers must be clear, transparent, and published. The allocation of cases must be done independently of the courts and the opposing participants (for example, defending public bodies or individuals in civil cases) and in accordance with the published criteria and procedure. There must be published anonymised information on how cases have been allocated, a right of challenge, and regular audit.

Proposition 19: The body administering legal aid must be independent and must be protected from interference (or attempted interference) in its decisions on the grant of legal aid and the allocation of work by government, the media, the profession and others.

Consultation Questions:

1. Do you agree with Propositions 17-19?

☐ Yes

☒ No

If not, please explain and/or suggest alternatives.

[37] See https://www.gov.uk/government/organisations/legal-aid-agency

We do not find it helpful to see these three propositions stated together. We have no problem with proposition 19. Proposition 18 has no application in Scotland, because any solicitor in Scotland can set himself up as a legal aid provider, subject only to certain minimal thresholds on competency and propriety. We do not understand there to have been any instance of alleged unfairness in the registration of solicitors to be legal aid providers. All counsel are available for legal aid instruction.

So far as proposition 17 is concerned, however, we would wish to emphasise that there must be no role for the prosecuting authority, complainer, or any other person (such as a newspaper or campaigning group) to object to the provision of legal aid to an accused person. The right to be defended in a criminal proceeding is a fundamental civil right which ought not to be infringed in any way.

We support the possibility of an opponent in a civil case having the opportunity to oppose the grant of legal aid. This is available in Scotland.

2. We would be interested to receive examples of :

a) Practice on this issue from a range of jurisdictions – Which body decides on the grant of legal aid and the allocation of cases in other jurisdictions? Should the judiciary have a role to play in granting legal aid for example?

The judiciary have a residual role in granting legal aid where there is an allegation of contempt of court arising in criminal proceedings. Otherwise all applications are to the Scottish Legal Aid Board.

Scottish legal aid is not available for proceedings outwith Scotland.

b) The circumstances in which the grant of legal aid and the allocation of cases can be challenged in other jurisdictions and by whom.

A party to a proposed civil litigation in Scotland receives intimation from the Board of the substance of the proposed action, and is then permitted a fixed period in which to make representations as to why legal aid should not be granted, either by reference to the applicant's means or the lack of any legal merit.

c) Whether individuals have the right to choose a civil legal aid provider in other jurisdictions.

In Scotland there is unfettered choice in selecting a legal aid provider. This can be limited in civil cases by a shortage of praticitioners prepared to provide legal aid in relation to particular types of case in particular geographical areas. A narrow but substantial class of matters arising in social welfare law, such as eviction or social security, are either not covered by mainstream legal aid or only inadequately so, but are catered for by charitable Law Centres who are funded by a range of sources including the Board and also local authorities and charities. The Scottish Law Centre sector is on the whole fairly robust and caters satisfactorily to the sectors of legal need covered.

d) The circumstances which constitute "interference" in this context in other jurisdictions.

We do not consider that the locus to make representations discussed above amounts to improper interference, and we do not consider that improper interference arises in this jurisdiction.

e) How interference in the grant of legal aid and the allocation of work is prevented in other jurisdictions.

See above

Security of tenure

By proposing security of tenure for the Board, Chair and CEO of any body administering legal aid, this proposition seeks to minimise the risk that the need for a good relationship between the body administering legal aid and the funding ministry takes precedence over proper decision-making and advice giving.

Proposition 20: To ensure that the pursuit of a reasonable working relationship with the sponsoring ministry does not threaten institutional, operational or financial autonomy, Board, Chair and CEO of any body administering legal aid should have robust security of tenure.

Consultation Question:

1. Do you agree with Proposition 20?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

PART E – THE PROVISION OF LEGAL AID

Part E looks in more detail at those who undertake legal aid work. It asks whether legal aid providers should be required to undergo special training and/or monitoring to assure quality and compliance (Propositions 21-26); whether legal aid should be provided by those in private practice or directly by those administering legal aid (Proposition 25); and what factors should govern rates of pay and the development of expertise (Proposition 27).

Qualification for legal aid work

These two propositions are focused on qualification for legal aid work and the process for setting relevant standards. The role (if any) of professional bodies of lawyers in the administration of legal aid (including the use of accreditation/quality assurance schemes produced by professional bodies of lawyers) is discussed in more detail in Part D.

Areas covered by legal aid may not generally have attracted the involvement of lawyers, and those without previous experience of legal aid work may not understand the specific requirements of the system and the three-cornered nature of the relationship between legal aid provider, client and the body administering legal aid. It is particularly important that legal aid providers understand their specific obligations to clients, who are often vulnerable with limited resources.

Entry level requirements to qualify as a lawyer are increasingly not regarded as sufficient to ensure the ability to do legal aid work. Those administering legal aid often have higher expectations. Therefore, the aim of Proposition 21 is to make clear that bodies administering legal aid are entitled to require evidence of sufficient expertise and standards from the start.

A central question then becomes how providers can demonstrate sufficient expertise – what the correct level of qualification should be and who should play a role in setting the appropriate standards. Proposition 22 is aimed at ensuring that the interests of justice and the client are not inadvertently diluted by the interests of the government or the profession.

Proposition 21: A provider who wishes to undertake legal aid work should be qualified to deal with the relevant area of law, either by experience or training, and should understand and be familiar with the legal aid scheme and how it operates.

Proposition 22: The body administering legal aid should consult with professional bodies of lawyers, as well as the sponsoring ministry, to establish the correct level of qualification mentioned in Proposition 21, but must have the duty to set the standard independently and in accordance with the published criteria and procedure.

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Consultation Questions:

1. Do you agree with Propositions 21-22?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. In response to this question, we would value views on:

a) Whether professional bodies of lawyers should decide who is able to undertake legal aid work and whether it should be any lawyer in good standing.

Because the Faculty of Advocates has robust structures and procedures, we do not consider that this is an issue that arises for us. The Association must realise that ours is by some margin the smallest Bar in the UK, with only 440 practising members.

b) We have provisionally decided not to include a reference in Proposition 21 to legal aid providers aligning themselves with the 'vision, mission and values' of the body administering legal aid – While the provider should understand and support the purposes of legal aid, we felt it more important to emphasise the interests of the client than the agenda of the body administering legal aid. In addition, in some jurisdictions, legal aid providers have a poor relationship with the body administering legal aid. Do you agree with this approach?

We agree. The Faculty of Advocates has a constructive relationship with the Scottish Legal Aid Board. The professional body for solicitors, the Law Society of Scotland, has, however, expressed dissatisfaction with the fees allowed and processes of the Board, and has gone so far as to say that the Board is "not fit for purpose". That assertion is currently being considered by a Strategic Review of Legal Aid in Scotland, conducted on behalf of the Scottish Government by an independent chair, which is considering the provision of legal aid generally.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Qualification requirements and accreditation/quality assurance schemes for legal aid work from a range of jurisdictions.

The solicitor wing of the Scottish profession has a system for accreditation of specialisations. Accredited specialists practice in both legally aided and non-legally aided fields, and very often the same person is involved in substantial measure in both legally aided and privately funded work in his or her specialisation. We consider that subject matter or field specialisation has advantages but that separating legal aid practitioners from the mainstream of the profession does not. We consider it imperative that legal aid practitioners should be held to the same quality standards of any other practitioner. We should not have one legal profession for the rich and another for the poor.
Solicitors are also subject to audit from the Board in terms of their systems and peer review. There is no similar scrutiny of advocates. The Board has thus far rested upon the Faculty's own quality assurance measures.

Professional codes of conduct

Some vulnerable legal aid clients may lack the knowledge/confidence to complain about poor quality legal service. This proposition is therefore concerned with ensuring that legal aid providers understand their specific obligations to their clients in the context of vulnerability and

limited resources. This proposition takes the view that professional codes of conduct will be sufficient to protect all clients, including vulnerable ones.

Proposition 23: Lawyers undertaking legal aid work are bound to carry out the work in accordance with their professional code of conduct.

Consultation Questions:

1. Do you agree with Proposition 23?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. In response to this question, we would value views on:

a) Where professional codes of conduct do not include a reference to the particular needs of vulnerable clients (or where legal aid providers are not members of a professional body with a code of conduct) how legal aid providers can demonstrate an understanding of these needs and how clients can be protected.

Legal aid services are provided by members of professional bodies, either the Faculty of Advocates or the Law Society of Scotland. Codes of conduct apply to all such providers. The Vulnerable Witnesses (Scotland) Act 2004 lays out statutory provision for the treatment of vulnerable witnesses. In addition, some fields of practice, for example the immigration tribunal, promulgate Codes of Conduct relative to vulnerable witnesses and appellants. Once again, and we see this is a theme that has emerged in our response, the standards and guidance are applicable to all who appear in the courts and tribunals, whether legally aided or not. We consider that is how it should be.

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3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Practice on this issue from a range of jurisdictions.

See above

b) A related issue here is that the legal aid budget must be used prudently and should not be allowed to fund unnecessary work at the behest of either client or the legal aid provider. Therefore, the principle of 'reasonableness' is a necessary check on legal aid work. We are interested to receive examples of how 'reasonableness' is understood and applied in this context in a range of jurisdictions.

We refer again to paragraph 3.23 of Chapter 4 in the Civil Legal Aid Handbook.

Model practice standards

This proposition envisages the development of model practice standards in order to help countries which are introducing or improving legal aid provision to devise proper qualification and quality criteria. These should take account of the wide variety of circumstances in which legal aid providers practice around the world in order to appeal to a range of jurisdictions.

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Proposition 24: Model Practice Standards for legal aid cases in the areas of civil, administrative and family law should be developed by relevant IBA committees, following the example of the UN Principles and Guidelines on Criminal Legal Aid in regard to those undertaking criminal defence work.

Consultation Questions:

4. Do you agree with Proposition 24?

☐ Yes

☒ No

If not, please explain and/or suggest alternatives.

As a small jurisdiction neighbouring a much larger one, we have experience of standards and practices being homogenised across internal borders of the UK when we have not thought this to be strictly necessary in our own context. For example, in the field of administrative law, we have seen the imposition of time limits for judicial review, and of a second appeal threshold, to filter out allegedly abusive litigation, a problem that did not exist here because of the differential rights of audience in the administrative courts. We consider that our practice in the fields mentioned is likely to compare strongly with that in any other jurisdiction. Cross fertilisation by voluntary exchange is far likelier to result in useful outcomes.

Identified quality and ethical standards

This proposition is that satisfactory legal aid services can be provided in a number of ways, for example, through private practice or salaried service; and that the decision of how to deliver legal aid services should depend on local circumstances. Membership of a professional body of lawyers should not be a pre-condition for providing legal aid services. There are jurisdictions where employed lawyers are not eligible to belong to professional bodies of lawyers, and others where they are, such as England and Wales – so this is a local circumstance to be taken into

account. Moreover, specialised civil society organisations often provide important legal aid services and may be better placed to represent clients in certain legal fields. The key here is that all legal aid providers should have professional autonomy and should adhere to identified quality and ethical standards. In addition, while client choice is unlikely to be possible in a salaried service, the client is entitled to expect expertise and professionalism.

Proposition 25: Legal aid services can be provided in a number of ways, for example by lawyers in private practice or lawyers employed directly by the body administering legal aid. Non-membership of a professional body of lawyers, for example based on the nature of employment, should not be used to prevent non-members from carrying out legal aid work that they are otherwise qualified to undertake. However, all legal aid providers must be held to identified quality and ethical standards, whether or not they are members of a professional body of lawyers.

Consultation Questions:

1. Do you agree with Proposition 25?

☐ Yes

☐ No

If not, please explain and/or suggest alternatives.
The Faculty's own Code of Conduct is available online at.
http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf

In Scotland, payment by legal aid is available to unqualified staff in Law Centres and or solicitors' offices, but only at half the rate payable to qualified personnel. It was anticipated when this was first permitted some 15 or so years ago that it would have a significant impact on the demographic of law firms, but that has not happened. We suspect that that is because the role of unqualified staff naturally devolves to a support rather than executive role, and that there is limited scope for such persons in tightly budgeted practices.

2. In response to this question, we would value views on:

a) Whether there should be mechanisms to ensure that professional independence is not compromised where legal aid services are provided by a salaried service. For example, see the code of conduct of the Public Defender Service in England and Wales (PDS is a department of the Legal Aid Agency and was the first salaried criminal defence service in England and Wales).[38]

There was scepticism as to the value of the public defenders when they were introduced but it is our impression that in fact their work has proved to be impressive, as has the work of the Civil Legal Assistance Offices.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Codes of conduct or other mechanisms used where legal aid services are provided by a salaried service (similar to the PDS code of conduct in England and Wales).

Salaried personnel will be regulated by the Code of Conduct of the Law Society of Scotland.

Monitoring and evaluation of the quality of legal aid work

This proposition focuses on monitoring and evaluation in relation to individual case files. Evidence of relevant training or expertise is a proxy for measuring quality, and a good minimum requirement for undertaking legal aid work. However, monitoring and evaluation (for example by auditing or peer reviewing completed files) is necessary to ensure that a good standard is being maintained, particularly when success is not a relevant measure.

Proposition 26: The body administering legal aid should put in place an effective system to measure the quality of work. This should consider the merits of outputs (assessed, for example, by audit or peer review) rather than inputs (for example, years of qualification or specific training) as the best way of assuring quality.

Consultation Questions:

[38] See http://publicdefenderservice.org.uk/solicitors/about-us/

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1. Do you agree with Proposition 26?

☒ Yes

☐ No

If not, please explain and/or suggest alternatives.

2. In response to this question, we would value views on:

a) Whether client feedback has a role to play here – for example surveys of clients to measure the courtesy, care and responsiveness of the legal aid provider.

No. Clients' satisfaction is result oriented, and the correlation between quality of service and quality of outcome is poor. All the lawyer can do is to put the client's case. The result may bear no relationship to the quality of service.

b) Whether the proposition should include a specific reference to the right of the client to raise concerns with the legal aid provider, the body administering legal aid and/or the professional body of lawyers.

Both the Law Society of Scotland and the Faculty of Advocates operate a well publicised complaints procedure dealing with complaints about conduct. Services complaints are dealt with by the Scottish Legal Complaints Commission. All forms of complaint are available to clients, regardless of whether they are legally aided, paying privately or funded in some other way.

c) The outcome or consequence of monitoring and evaluation processes – For example, in cases of poor quality work, should payment be denied, even where work is done in good faith?

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In rare exceptional cases, judges can and do report poor quality service to the Board, albeit on an informal basis. There is no formal mechanism for this to occur.

d) Whether quality assurance processes should take into consideration rates of pay. For example, fixed fee systems in some areas of legal aid work may make it difficult for legal aid providers to do all they would do for a privately paying client within the scope of legal aid, which may affect outcomes in some cases.

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) How quality in individual cases is monitored and evaluated in a range of jurisdictions; and which body is responsible for setting and enforcing quality standards.

The Scottish Legal Aid Board operates a peer review process and rigorous office audit for legal aid providing solicitors.

b) How client confidentiality is assured during any monitoring and evaluation process. For example, are clients asked to give consent on their legal aid application form?

Rates of pay and development of expertise

There is a link here to Proposition 2 which addresses remuneration for legal aid work in the context of setting a legal aid budget, and asks whether appropriate rates of pay should be independently evaluated.

Proposition 27: Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.

Consultation Questions:

1. Do you agree with Proposition 27?

☐ Yes

☒ No

If not, please explain and/or suggest alternatives.
We wish to comment on this on some length, as it affords an opportunity to make observations on two matters which seem to us to be important to the provision of legal services in the fields in which legal aid is provided. Those issues are to do with the recovery of judicial expenses and the levying of court fees. So far as the first issue is concerned, legal aid practice in public and administrative law in Scotland is underpinned and subsidised by the availability of judicial expenses where a party is successful. A lawyer practising in that field can absorb relatively low rates of pay under legal aid if they know there is a possibility they will be paid at a commercial rate if they win. Such an arrangement incentivises the selection of meritorious cases and discourages the bringing of weak cases. Any approach to legal aid funding which leaves out of account the importance of judicial expenses being recoverable is liable to be an incomplete account.

So too is an account that leaves out consideration of court fees. Until the introduction of prohibitive court fees, it was possible for practitioners to provide their services on a speculative basis to persons who were too well-resourced to qualify for legal aid but not resourced enough to afford private legal services. The exigibility of huge court fees closes off that possibility and for an admittedly small but not negligible group of people denies them access to justice. We refer to our response to Proposition 5 above.

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2. In response to this question, we would value views on:

a) The factors which should govern rates of pay and the development of expertise.

Rates of pay for legal aid have been frozen for many years, particularly for solicitors in the field of criminal law. The fall off in the rates of pay has affected civil law by making firms reluctant to provide services to legally aided parties. In some areas of Scotland and in some types of legal dispute it can be difficult to find a solicitor (for example a solicitor in Edinburgh prepared to act on legal aid in relation to the financial aspects of a divorce).
So far as we in the Faculty are concerned, while we have been affected by the general differential between commercial and legal aid rates of pay, we are also affected by the reluctance of the Board to sanction the employment of counsel. This was litigated in the criminal context in a case we mention above (*McAllister v Scottish Legal Aid Board* [2010] CSOH 112, 2011 SLT 163). The reluctance to sanction the employment of counsel in appropriate cases affects not only the individual client but also has an impact on the development of the Bar over time.
The limitation on payment does of course arise in the context of an uncapped legal aid budget.

b) Whether rates of pay should be set independently of government and whether, for example, there should be a pay review body.

We refer to our observations earlier in our response – in such a small jurisdiction, an attempt to transfer a relatively contentious issue such as lawyers' pay to a committee of experts could be unpopular with practitioners and unacceptable to the government. The balancing of an uncapped legal aid budget with the maintenance of legal services provided from that budget is a political issue, but the dissatisfaction being expressed by the Law Society of Scotland does need to be addressed. Some sort of independent evaluation is necessary.

c) Particular considerations that should be taken into account when advising on rates of pay for (a) salaried service and (b) outsourced service delivery.

See above

3. We are interested to receive examples of (attach relevant documents with completed survey if necessary):

a) Practice on this issue from a range of jurisdictions.

Not applicable

b) Practice in jurisdictions where legal aid is provided via a form of mandatory pro bono.

Not applicable

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