SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD

1. The Scottish Legal Aid Board (“the Board”) was set up in 1987 as an independent non-departmental public body responsible to the Scottish Government. Our main functions are to manage the Legal Aid Fund and to advise Scottish Ministers on the current operation and development of legal aid provision.

2. The Board would wish to raise the following points—

Scope of the Bill

3. It is not clear from the legislation whether records submitted to us by the legal profession in relation to legally aided cases are within the scope of the records management plan. There are currently no contractual arrangements between the Board and the legal profession. The Board may have access to the records of solicitors and advocates although these are ultimately the property of the client and are covered by separate rules (see below on confidentiality).

Confidentiality

4. We are mindful of our responsibilities regarding confidentiality, particularly those governed by section 34 of the Legal Aid (Scotland) Act (‘the Act’) that prohibits, amongst other things, the release of information without the consent of the provider. As well as restrictions under section 34 of the Act, the records created and held by solicitors and advocates may be governed by other statutory and professional provisions around confidentiality and privilege.

5. If the intention is simply to make these records the subject of a records management plan with the aim of improving record keeping across the public sector (which is how the Board reads the Bill) then the Board would not have a difficulty (subject to the below comments on costs). However, if the intention is to make these records public, then the Board believes that any statutory provision should be arrived at only after careful consideration of issues of this type; and regarding legal aid, such a proposal would certainly require consultation with the Law Society of Scotland and the Faculty of Advocates.

Costs

6. We are now operating in a difficult economic environment which is affecting both the private and public sector. The Scottish Government has cut the funding for both the administration of legal aid and the Board’s running costs by around 8% in 2010-11 which will be extremely challenging.

7. The Board welcomes the aim of the Bill not to reduce any new significant costs for public bodies. An obligation for the Board to create and maintain a records
management plan should not introduce significant costs for the Board if, as the Financial Memorandum states, it—

“largely consists of administrative time to compile and submit plans to the Keeper for authorisation, ensuring that an authority’s records management provision is up-to-date and current, and facilitating the Keeper’s scrutiny function. For an authority with such provision it will be possible to prepare a credible plan on the basis of existing documentation and policy statements.”

8. However, as there has been no consultation on what a model record management plan would look like, the Board cannot comment on how realistic this is. We look forward to being able to comment on the model plan in due course.

9. The Board would also not wish the Bill to introduce additional costs or obligations for private sector solicitors or advocates. The Financial Memorandum states—

“private or voluntary bodies will be affected by the new proposals to the extent that the records they create under contract to a public authority in providing a service must be managed as if they are public records. This means that they will be required by the public authority to comply with the requirements of the public authority’s RMP with respect to those records.

If the private or voluntary body has a robust records management regime there will be no additional burden. If they do not, then they may need to put a system in place, but only in relation to the records created under contract to the public authority. This may be as simple as designating a secure space within an existing office area and designating a responsible person, perhaps the office manager, to have responsibility alongside existing duties for the management of the records kept there. Or, to have the relevant administrator permissions for a designated area of the authority’s file plan in the case of electronic records.”

10. The Board would not expect it to be required to ask private practice solicitors or advocates to carry out any additional duties as a result of this Bill.

Proportionality

11. The Board, like others, would wish to raise the issue of proportionality. Although the Board welcomes any desire to improve the record keeping of public bodies, doing this through legislation needs to be justified.

12. There were clear failings in record keeping which were highlighted in the Shaw report. However, these were part of a wider systemic failure in the looked-after children sector. The Board is unconvinced that there is sufficient evidence of a systemic failing in records management across the public sector as a whole which necessarily warrants a new regulatory regime.
13. The Board welcomes that the proposals for civil sanctions for non-compliance with a records management seem to have been dropped.

2 December 2010