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Audrey Nicoll (Convener)
Criminal Justice Committee
The Scottish Parliament
Edinburgh
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1 March 2022

Dear Convener,

**The Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022; and
The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022**

The Committee is due to consider The Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022 on 2 March 2022. I thought it helpful to provide some further information in advance, and also in respect of The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022, which I understand the Committee will also have an interest in. I will also address the issue of legal aid more generally.

The Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022 will increase the levels of initial authorised expenditure available to legal aid providers, above which approval must be sought from the Scottish Legal Aid Board (SLAB) for further funding. Due to increases to legal aid fees, the existing prescribed limits would often be exceeded by a solicitor unless prior approval was sought. The primary purpose of these regulations is to support the increased fees available and reduce unnecessary interactions for both legal aid providers and SLAB.

The main purpose of the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022 is to introduce a 5% increase to all legal aid fees, fulfilling the second part of a commitment made by the Scottish Government in 2020 to deliver a 10% fee uplift over a two year period. This builds on a 3% increase provided in 2019, 5% uplift for 2021-22 and grant funding of £9m provided in 2021.

These Regulations also create a new supplementary fee payment which will allow for a solicitor to claim an extra £80 per case when attending a holiday court sitting. This payment was originally developed as part of the Scottish Government's response to legal provision during the COP26 Conference in 2021, for non-COP26 custody cases that called in court

during a weekend. The figure has been designed by taking the highest detailed fees payable for crime (solemn), based on 1 hour of time split between: 45 minutes for taking instructions (non-advocacy) and 15 minutes to make the plea (advocacy); and a 33% uplift in line with the enhancement which applies to “unsocial” police station advice. The figure is then rounded up to £80.00, which equates to approximately 34.5% of this fee. A great many custody cases are paid on a lower fee rate and therefore, per case, the additional payment will be much higher, and may be in excess of 100%. This new supplementary fee payment will put in place an improvement for those that are willing to participate in holiday custody courts. As with all fees, I would be very willing to consider adjustments to this in the future.

Over the last two years the Scottish Government has engaged with representatives of the legal profession and the Scottish Legal Aid Board to develop reforms to improve the current system whilst also working towards the introduction of a legal aid reform bill. That engagement continues to identify further more immediate improvements that can be made to legal aid fees.

In the shorter term, we are progressing proposals for reform in both solemn and summary criminal legal assistance. These proposals provide significant additional fees for criminal solemn and summary work. The solemn reform would include, for example, an increase in the section 76 fee for early disposal of a case, previously raised by the profession in its meeting with the Committee. Proposals for summary reforms seek to streamline the fee system by simplifying the structure and reducing the number of circumstances that lead to lower fees being payable. The package of reforms would provide an extra £3.8m in fees for these areas of work.

These additional proposals have been shared with the profession. The committee may be interested in the latest communication from officials to the Law Society and SSBA and I have attached it to this letter, detailing these more immediate reforms.

In the longer term we are committed to working with the profession on moving forward with continued improvements where these can be made, to support the sustainability of the legal profession and maintain and improve access to justice for individuals and the wider efficiency and recovery of the justice system. We note the results of the Bellamy Review of Legal Aid in England and Wales. This review produced meaningful recommendations due to the factual data provided by the profession. This type of evidence supported review is what was recommended by the Legal Aid Payment Panel. The existing evidence about firms provided by the Society does not provide any of the information which was provided to the Bellamy Review.

Meantime, these regulations will, if approved, put in place significant additional fees for solicitors.

A handwritten signature in black ink, appearing to read 'Ash Regan', with a stylized, cursive script.

ASH REGAN

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Your ref: KD/LB
28 February 2022

Dear Ken

Thank you for your letter of 19 January.

As we have discussed previously, the Scottish Government and Law Society of Scotland share the desire for a strong and sustainable legal profession and to ensure that publically funded legal aid can continue to provide access to justice across Scotland and support the on-going process of justice recovery and reform.

The Scottish Government is publicly committed to both immediate and more substantial reforms to legal aid to achieve these aims, and the level of payment of fees forms part of that work.

As discussed when we met in January, we have been working with the Scottish Legal Aid Board (SLAB) on proposals for targeted criminal fee reforms that can be taken forward in the immediate term. These reflect specific improvements that we have been discussing for some time with representatives of the profession and have identified a shared desire to move forward on.

The solemn proposals have been improved significantly since those shared with the profession in December 2020 but not taken forward at that time. These significant reforms simplify the fee structure, substantially reducing the bureaucratic burden associated with solemn work and increasing certainty of payment. Perhaps most significantly, the reforms address the long recognised disincentive to early preparation and resolution of cases by providing for a major increase in the payment available for cases that do not proceed to trial, and particularly those that resolve via s76.

As a result of your initial feedback on those proposals, Ministers agreed to reinstate the full fee for waiting time and the benefit of that change is reflected in the attached revised table. Following our further discussions, and particularly your concern that the boost to s76 fees was at the expense of those cases proceeding to trial, we asked SLAB to remodel the fees

to ensure that fees for trial cases were protected. SLAB has now completed that work and this has resulted in an increase in funding for cases that proceed to trial of over £400 (excluding VAT) compared to the original proposals. Alongside the change to waiting time, the package now incorporates a substantial fee rise: the combination of the revised reform proposals with the existing and upcoming increases of 3%, 5% and 5% delivers a total increase in funding for solemn cases of 23.5%.

As we undertook at our meeting of 19 January, we have also revisited the summary reform proposals. This is a more complex package of changes but again seeks to streamline the fee system by simplifying the structure and reducing the number of circumstances that lead to lower fees being payable. The effect of the changes to both summary criminal legal aid and ABWOR fee structures is to eliminate most of the occasions on which a reduced core fee is payable, meaning that the full fee will now be payable in 9% more summary cases and 14% more ABWOR cases.

Alongside a further increase to the core fee for both sheriff and JP courts, SLAB has also costed proposals to address the low trial fees payable in JP court cases. We propose to increase the day one fee by 50%, quadruple the fee for a second day of trial and double the fee for a third or subsequent day. This brings the JP trial fee structure into line with that proposed for the sheriff court, which also sees improved payments for day two.

In line with the solemn proposal to better reward early preparation and resolution where appropriate, we also propose to address a longstanding anomaly between the summary and ABWOR fees for JP cases. We therefore propose to enhance the JP ABWOR core fee by making it the same as the proposed fee for summary legal aid i.e. £346.37, more than double the current fee.

The full detail of the changes proposed to summary ABWOR and legal aid are set out in the attached document. The net effect of the changes is an overall increase of over £1.8m – or just under 6% - compared to the 2019/20 baseline year. The combined effect of the summary and solemn proposals is an overall increase of around £3.8m, or 7.5% of expenditure on these aid types.

Regulations to take forward solemn reforms can be developed fairly quickly and laid before the summer recess. Those that will deliver summary reforms will take slightly longer and we would aim to lay these after summer recess.

The package of regulations to implement the solemn reforms will also contain legal aid adjustments that allow for progress of the Evidence and Procedure pilots for summary criminal courts within specific sheriffdoms. Justice colleagues – including local solicitors – met recently to discuss the revised arrangements for early engagement and case management, building on the initial Evidence and Procedure Review pilots in Hamilton, Paisley and Dundee and taking into account some of the changes that have been made since those pilots were suspended as a result of the pandemic.

As part of these discussions, SLAB has developed proposals for a new payment arrangement for cases that resolve without calling as a result of the early disclosure of evidence and subsequent engagement between the defence and the Crown. As things stand, cases that resolve in this way could only be paid under time and line advice and assistance. SLAB has proposed that where a solicitor is instructed, early enhanced disclosure takes place and the matter resolves following discussion between Crown and defence, a fixed fee equivalent to that for ABWOR or summary criminal legal aid should be payable. This enables solicitors to engage fully at the earliest stage possible without carrying

the risk that they end up being paid very little in comparison to a case that doesn't resolve until it first calls (or at any stage thereafter).

Draft regulations to make this change, with a view to ensuring that any new provision can be applied without the need for further regulations should the pilots prove a success and are rolled out elsewhere, will be shared with you before they are laid, and will include the solemn reforms as stated above.

In the meantime, we would ask that you share these proposals, and the explanatory notes, with your members through the usual routes. We will also look to share these proposals more widely with relevant justice partners. Your feedback on these proposals is welcome and we would also be happy to discuss these with you.

Subject to finalisation and agreement by Ministers and Parliament, these proposals for immediate fee reforms for solemn and summary cases would further enhance fee levels for the specific identified areas in addition to the 5% general uplift in fees for 2022-23 already being progressed through Parliament, on top of the 5% uplift this year.

In addition to these immediate measures, we are aware of the wider request from the Society and SSBA for a very substantial overall increase in fees of 50% across all current fees, which would incur a recurring annual cost of at least £57m.

As I explained when we met, the most immediate available route for considering further substantial increases in legal aid funding is through the current Resource Spending Review process. This will set the budget priorities for the remainder of this parliament and is due to publish its outcome by May this year.

As we discussed when we met in December and January, it is important that we are able to align proposals for any additional funding clearly with responding to the specific issues raised by the profession, including the geographical availability of particular legal services; services designed to meet the needs of particular groups; the recruitment and retention of staff, including trainees; diversity and work life balance etc.

I note that the Society does not feel able to work with us in preparing further information or analysis to contribute towards the Spending Review process. Nevertheless, I confirm that we will make use of the evidence that we do have available to help inform Ministers' decisions within the Spending Review process, including with reference to legal aid and the on-going sustainability of the legal profession.

In addition to the work through the Spending Review, I am keen that we make progress with the proposal set out by the Payment Panel to strengthen the process for both setting and reviewing legal aid fees on an on-going basis.

We are aware of the recommendations of the independent Review of Criminal Legal Aid in England and Wales, which, following research and analysis supported by the Law Society there, recommended a 15% increase to criminal legal aid fees to address similar issues in England and Wales, although relevant to the separate context of criminal legal aid there. That data was persuasive in reaching the conclusions made and I would want to pursue the collection of data for Scotland as part of our work in taking forward the recommendations of the payment panel. I hope we can work together on that process.

If there are other immediate reforms that can both benefit the profession and support the more efficient operation of the justice system then we are very keen to explore these. We

are open to consider with SLAB and the Society any early changes that can assist these proposals and to keep further changes relevant to these and other justice reforms under review.

I hope that we can continue to work together to deliver immediate reforms to fees which can support the sustainability of the profession and the on-going delivery of access to justice.



NEIL RENNICK