January 15, 2019

Dear Convener,

Questions on Subordinate Legislation – The Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/68), and The Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/78)

Thank you for your email dated 27 March 2019 where the Justice Committee sought further written clarification in relation to the above two instruments.

The Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019

I am grateful for the Committee for the points raised in connection with the increases to employer contributions included in this statutory instrument. Under the Police Pensions Act 1976 and the Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142), the Scottish Police Authority is the employer for the purposes of police officer pensions in Scotland. Since 2010 the Scottish Government has directly funded the full cost of Police employer pension contributions. This will continue to be the case in 2019-20, with the Scottish Government providing the full costs of employer contributions to the Scottish Police Authority, including the estimated £40 million additional costs required by changes introduced by HM Treasury.

In response to your second question, Scottish Ministers have written to the Chief Secretary to the Treasury to request that the additional costs arising from the increases to employer contributions are covered in full by the UK Treasury. The Chancellor of the Exchequer stated in Budget 2018 that funding would be provided through Barnett consequentials, however full details have yet to be confirmed either for the police scheme or for the other unfunded public service schemes in Scotland. When the position is clear, I will write to you to confirm the amount received in respect of police officer pensions and in what form this has been disbursed.

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The Legal Aid Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2010

I welcome the opportunity to set out plans to improve and reform the legal aid system, reflecting on the current priorities and financial landscape against which improvements are being made. I also welcome the opportunity to respond publicly to the particular points raised with the Committee by the Law Society of Scotland (LSS) and the Edinburgh Bar Association (EBA).

I know that the Minister for Community Safety, Ash Denham MSP, engages regularly with the LSS and the Faculty of Advocates in respect of their role as representative bodies for their respective colleagues, and has contributed to this response.

You are of course aware of the establishment of the Independent Review of Legal Aid and the subsequent report of its Chair, Martyn Evans. This review delivered on our commitment to review and reform the legal aid system in Scotland in light of emerging changes in the needs of those who use the system, those who deliver it and the modernisation of the Justice system in Scotland.

I was impressed with the wide engagement that the review undertook in considering legal aid and I know that the Chair in particular met a great many individuals and organisations with an interest in the way in which legal aid currently operates and the scope for future reforms. The report provided to Ministers was therefore well thought out and has been broadly welcomed both at home and internationally.

The report set out a 10 year vision for legal aid reform and made 67 recommendations on how this vision can be delivered. These recommendations propose a simpler, user focused and more flexible legal aid system, reframed as a public service. This is a radical change from the current legislative framework which mainly sets out the terms of the financial relationship between the Scottish Legal Aid Board (SLAB) and those who deliver legal services. The needs of those who use and need the legal aid system play a minor part in the current legislation.

The Scottish Government welcomes the suggested user-friendly approach recommended in the report which also makes clear that the Scottish legal aid system compares very well internationally – a point that I think should not be lost as we move forward.

The Scottish Government response to the Review recognised that there is an opportunity to develop a new statutory framework for a modern, forward-looking and user-centred legal aid service for Scotland. The response signalled our willingness to take forward supported recommendations that will deliver an enhanced system of legal aid across Scotland and the ambition that publicly funded legal assistance continues to be recognised as an invaluable public service. That response also set out a range of shorter term improvements that would be made to the legal aid system of which a 3% uplift was prioritised.

To the disappointment of many in the legal profession the Chair of the Review did not consider there to be enough evidence to support an immediate uplift in legal aid fees.

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However, he did reflect on his frustration at the lack of evidence presented to support the submissions made on fees. Therefore, his recommendation focused on the need to build and agree an evidence base on which fees could be reviewed. This is being taken forward by the Expert Payment Review Panel, expanded on below.

While Scottish Government respected that position, it also recognised the impact of the current financial landscape and the value of solicitors who deliver legal aid. It was also recognised that the development of an agreed evidence base and further review could be time consuming. Therefore, this Government pledged a 3% increase in all solicitor and advocate legal aid fees in recognition of their value to the legal aid system. This was managed within a very challenging financial position and without diminishing the other financial priorities put forward by the Justice Committee in its spending review paper. It is also in stark contrast to the position in England and Wales where a 1% increase was applied only to criminal barristers.

It was always the intent to implement this increase with effect from April 2019 and the Minister for Community Safety made this clear in her announcement around a 3% increase. The policy intention from the outset was that these regulations would follow the normal Parliamentary process allowing officials’ time to fully develop the SSI through inception, development, pre-laying and scrutiny. The Committee will recognise from the length of the SSI that there was considerable, time consuming, work involved in producing these regulations.

We have reviewed the technical points raised by the LSS and while the majority are matters of clarification we accept there are minor administrative points to amend e.g. in schedule 3 paragraph 2 the word ‘petition’ is missing after the word ‘prepare’ and schedule 6 table B part 2 has missed the words ‘travel is undertaken in addition to any of the above fees’, although it should be noted that the actual provisions for when travel fees are engaged are set out in Schedule 4, paragraph 14 and 15 so the wording has no effect on the application of the fee.

We have reviewed the point of raising the maximum fee levels however at this time that is not considered necessary. We do not anticipate this having a noticeable impact on applications for funding above the maximum levels.

As the minor changes needed are considered low risk and will not stop solicitors being paid at the new rate it is not proposed to take these forward as an emergency SSI but to include them in a forthcoming SSI. Officials will meet with the LSS to clarify the technical points.

Expert Payment Review Panel

The Minister for Community Safety wrote to the Justice Committee on 8 February 2019, regarding her intention to convene an expert panel to advise on an evidence-based process and methodology that could underpin a review of fee structures and fee levels for legal aid services provided by solicitors and advocates.

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The panel met for the first time on 15 March 2019, and is comprised of academics, members of the representative bodies of the legal profession and SLAB. It is expected to report to the Minister by December 2019.

The expert panel will include consideration of methods of provision where areas of law/geography are not currently easily available. The Minister for Community Safety will report to the Justice Committee on the outcome of this work in due course.

**Legal Aid Budget**

I have referenced the challenging financial climate within which the legal aid system in Scotland operates and this is of course a key interest for the LSS and the EBA.

The Scottish Government spending decisions must take place within the budgetary controls and regulations set by HM Treasury. As you are aware the Justice portfolio has responsibility for the civil, criminal and administrative justice systems including Scotland’s prisons, courts, tribunals, the legal aid system and criminal justice social work. Despite cuts to the Scottish Budget from Westminster, Scottish Ministers have maintained the scope of legal aid and have not cut its availability; all who are eligible for assistance will continue to benefit from it.

In the submissions made to the Committee, the case for further financial increases is strongly put, as is the current level of legal aid expenditure. Committee members are aware that the legal aid budget is demand led and an uncapped budget can be subject to fluctuation.

The current reduction in expenditure, of around 29% since 2011/12, is a result of a range of changes in the justice system; lower numbers of legal aid applications, fewer criminal cases and increased alternatives to prosecution to name a few. This of course has an impact on the available income from legal aid compared to previous years, and while the level of legal aid fees has a part to play in the income levels of solicitors it is only one part of the story.

This Government has delivered, and will continue to deliver, radical reforms to Scotland’s justice system, we will ensure the system meets the needs of people in the 21st century.

This reform has focused on preventative approached and community based solutions to tackle the root causes of crime. The success of our approach is mirrored in the falling cases of criminal convictions.

The table on the next page shows the fall in case numbers awarded legal aid between 2010/11 and 2017/18.
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<thead>
<tr>
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<th>Number of cases 2010/11</th>
<th>Number of cases 2017/18</th>
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<tbody>
<tr>
<td>Summary JP</td>
<td>8,104</td>
<td>6,953</td>
</tr>
<tr>
<td>Summary Sheriff</td>
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</tr>
<tr>
<td>Solemn</td>
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<td>9,787</td>
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The justice system change is illustrative of the impact of preventative action and efficient systems planning in reducing the financial burden on the public purse and focusing on priorities; many of the points made in the Christie Commission report. In some ways the legal aid system, and the inflexible legislation has failed to keep pace the level of change and this will be addressed as part of the reform agenda.

Other changes, such as new legislation and policies can impact on legal aid expenditure and I am aware of some that will increase the demand for publicly funded legal assistance. For example, the new court processes introduced by the Age of Criminal Responsibility (Scotland) Bill and the statutory redress scheme, including funding for legal representation, to pursue cases arising following the child abuse inquiry. The introduction of Universal Credit, and the unstructured implementation of that is likely to lead to an increased legal aid bill while the arrangements bed in and more are moved over to that scheme. The Scottish Government is therefore bound to fund this additional support for a scheme of welfare reform that it resists.

Reference has been made to the cost of providing advice on police stations which is lower than anticipated. The Committee will remember that when the SSI around police station advice came before them there was controversy caused by the submissions from, among others, the Law Society of Scotland (LSS) and the Edinburgh Bar Association (EBA). There was a belief among the profession that the Criminal Justice (Scotland) Act 2016 would result in unmanageable levels of out of hours police station advice and that the profession had insufficient capacity to meet that demand.

The predicted cost of this police station advice was anticipated at £3.2m. The levels of out of hours advice have not materialised as anticipated and that is why the spend is currently lower than was originally forecast. However officials are working with SLAB, Police Scotland and other justice sector partners to try and gauge future demand going forward. Expenditure from June 2018 to July 2019 will provide a more meaningful comparison between actual numbers and projections. Having said that no reduction from the forecast £3.2m can be classed as a ‘saving’ as the legal aid budget is demand led.

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The EBA has claimed that in Edinburgh the number of criminal courts has increased by a quarter since 2011. We can find no evidence to support this claim and Scottish Courts and Tribunal Service have stated this figure is not accurate. It would be useful if the EBA could provide further information to officials that can allow this point to be further investigated.

Reduction in Numbers of Solicitors providing advice on criminal matters

The numbers of solicitors registered to provide criminal legal aid has been reducing for many years but these reductions should be viewed alongside the reduction in criminal prosecutions and convictions, which I referenced earlier in this response.

As at 1 April 2006 there were 1,516 solicitors registered for criminal legal aid. That number is now 1,108. The registered numbers do not provide an accurate picture of the provision of criminal legal aid. The numbers of firms and solicitors on the register is only a concern for the delivery of legal aid should the numbers be insufficient to meet demand from people who are eligible to access legal assistance. Currently, it is considered that there is no risk of insufficient supply. However, the points raised around age and gender are worth exploring and my officials will seek further information from the EBA on this point and further information provided to the Committee.

We are aware of areas where direct action by a small minority of individual bar associations, including the EBA, has created a highly focused supply issue in that there are no private solicitors participating in police station duty plans in some part of the country. In Edinburgh this action has also extended to other aspects of court-based duty work. Gaps that have been created by this action have been filled by the Solicitor Contact Line and Public Defence Solicitors Office with minimal disruption.

My officials will continue to work with SLAB to monitor demand, supply and expenditure patterns and their impact on local markets and future supply. SLAB are also working with the LSS to analyse the demographics of the criminal bar and assess the adequacy of traineeship numbers. Initial analysis suggests that the numbers currently operating in, and entering, this area of practice are not disproportionately low given current and projected business levels.

SLAB is working with the LSS to establish an accurate picture of the number of trainees involved in criminal practice. At the present time the numbers do not indicate a cause for concern in the future.

2011 Cuts to Legal Aid Budget

The EBA submission to the Justice Committee also referenced the work undertaken in 2011 to reduce legal aid expenditure. This was a direct response to the economic downturn which had a devastating effect on the Scottish budget settlement from HM Treasury and which affected a vast range of publicly funded services, including legal aid.
The savings to the legal aid fund in 2011 were designed to protect access to justice as much as possible by targeting legal assistance at those most in need. This Government was, and remains, committed to maintaining and improving access to justice by preserving a fair, high quality and equitable legal system which has public confidence at affordable and sustainable levels of expenditure. Achieving savings in this way avoided the catastrophic approach taken in England in Wales to slash the scope of legal aid and reduce fees.

The EBA has suggested that these savings were intended to be temporary actions that would be reversed in the future. Despite intensive investigation, by both Scottish Government and SLAB, we can find no evidence of any promise to reverse the cuts made to legal aid fees in 2011.

The then Cabinet Secretary for Justice wrote to the LSS, Faculty of Advocates and the Justice Committee in October 2011 detailing the Scottish Government’s plans for legal aid following the publication of the Scottish Spending Review 2011. He advised that immediate reforms to legal aid were expected to deliver a reduction in expenditure of about £11m in 2001/12 rising to around £15-16m thereafter.

Initial Scottish Government proposals in 2011 were to increase the Public Defence Solicitors Office (PDSO) shares of the duty plans to around 60% to make savings however negotiation with the LSS brought about an amended, reduced, package of around 35%.

The fee changes were part of the need to find an 8.2% reduction in the legal aid fund, SLAB were also asked to make very substantial efficiencies and savings on their administration costs.

As we believe there was no commitment to the fee savings in 2011 being temporary the proposals by the EBA around fee levels are not valid. Indeed, the current financial landscape remains challenging as the Committee will be aware and it is not affordable to reverse this savings package as has been suggested.

Public Defence Solicitors Office

The EBA suggests that the costs of the Public Defence Solicitors Office (PDSO) is disproportionately high. The costs between the PDSO and the totality of private solicitors cannot be directly compared. PDSO costs include, but are not limited to, salaries, pension costs and building costs. These are not factors in legal aid payments to private solicitors.

PDSO solicitors do not work fixed hours. While they have core hours as employees of SLAB their contracts require them to work such hours as necessary to discharge their function as criminal defence solicitors. Additional hours do not attract overtime payments except for out of hours police station work. Private solicitors are also paid an enhanced rate for work out of hours when providing advice to people in police custody.
Fee Simplification

As set out in the Scottish Government response to the legal aid review, it is our intention to deliver improvements to the legal aid system and simplification of criminal fees is an early priority. Work has begun and SLAB conducted a number of events with the profession around proposals to streamline and reform the payment arrangements in respect of solemn, summary criminal and ABWOR fixed payments and post-conviction ABWOR Proceeding.

We now plan to commence consultation with the profession around these changes in the coming weeks.

Any revisions to criminal payment arrangements will aim to:

- Facilitate the early resolution of cases where appropriate
- Eliminate or reduce the need for costly preparation of accounts and/or the need for SLAB to review and re-negotiate solicitors’ accounts
- Provide faster and more certain payments to solicitors
- Provide the platform for the use of digital systems to simplify and compliment the submission of accounts
- Reduce administrative costs for the profession
- Reduce the need for detailed time recording in a majority of cases

The options for streamlining criminal legal assistance will be capable of delivery in the short to medium term.

I trust this response meets your needs and provides assurance that the Scottish Government is working closely with all of those who have an interest in legal aid, including the legal profession, to ensure that it delivers for those who need it.

As well as a targeted consultation on criminal fee reforms I know that the Minister for Community Safety intends to issue a public consultation on the recommendations made as a result of the Independent Review of Legal Aid in Scotland and will write to the Justice Committee at that time.

Best Wishes,
H. Yousaf

HUMZA YOUSAF

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